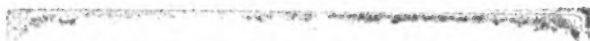


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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

OCTOBER, 1906, TO FEBRUARY, 1908

F. W. AMES

REPORTER

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VOLUME 16

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OFFICERS OF THE COURT DURING THE PERIOD OF
THESE REPORTS.

HON. D. E. MORGAN, Chief Justice.

HON. JOHN KNAUF, Judge.²

HON. CHARLES J. FISK, Judge.³

HON. BURLEIGH F. SPALDING, Judge.⁴

F. W. AMES, Reporter.

R. D. HOSKINS, Clerk.

²Appointed August 1, 1906, to fill vacancy caused by resignation of Judge Young, effective August 15, 1907.

³Elected to fill vacancy caused by resignation of Judge Young and qualified January 10, 1907.

⁴Appointed January 31, 1907, to fill vacancy caused by resignation of Judge Engerud, and qualified February 1, 1907.

CONSTITUTION OF NORTH DAKOTA.

SEC. 101. Where a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the reason therefor shall be concisely stated in writing, signed by the judges concurring, filed in the office of the Clerk of the Supreme Court and preserved with a record for his dissent in writing over his signature.

SEC. 102. It shall be the duty of the court to prepare syllabus of the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
NORTH DAKOTA

THE STATE OF NORTH DAKOTA V. S. S. RICHARDSON AND L. R.
CARROLL.

Opinion filed November 5, 1906. Rehearing denied December 12, 1906.

Officers — Removal — Procedure.

1. In proceedings under section 9646, Rev. Codes 1905, or section 7838, Rev. Codes 1899, for the removal of public officials, it is proper to object to the accusation on any ground one might assign by way of demurrer to a complaint. If objections to the accusation are overruled, an answer must be filed and trial had in a summary manner.

Same — Form of Accusation.

2. Accusations for removal from office for malfeasance must be presented by a grand jury.

Counties — County Commissioners — Accusation in Proceeding for Removal.

3. It is not necessary that an accusation under section 9646, Rev. Codes 1905, should contain all the facts and circumstances surrounding the alleged charge and collections of illegal fees by public officials, but a statement that said county commissioners "presented bills against said county for their services, which were unlawfully and corruptly allowed by said defendants acting as a majority of said board of county commissioners," and further pointing out the specific bills, claimed as illegal, stating that said defendants "charged and collected" said bills from said county, states sufficient facts to constitute cause for removal.

Same — County Commissioners — Compensation — Day's Work.

4. The law does not specify the maximum number of hours which shall constitute a day for county commissioners' services, but there can be no more than one day charged for services performed in the 24 hours, from one midnight to the midnight succeeding. No per diem is allowed county commissioners for time in coming to and going from their regular session. The mileage only is allowed for travel.

Same — County Commissioners — Criminal Liability.

5. The fact that a county commissioner does not know that the charges he makes for his services are illegal is no excuse for making the illegal charge.

Same — Judgment of Removal.

6. The order finding defendant "guilty" as they stand charged in paragraphs 17, 25 and 26 of the accusation, and that "the defendants, L. R. Carroll and S. S. Richardson be removed from the office of county commissioners of Ward county," is sufficient upon which to base a judgment of removal from such office and the judgment is practically the same language is sufficient, and it is unnecessary that the judgment particularize the specific acts of guilt where it is shown that illegal charges were made in monthly bills and they are set forth in the accusation.

Costs — Criminal Prosecutions — Appeal.

7. The respondent is not allowed costs for unnecessary reprinting of portions of abstract in the brief.

Appeal from District Court, Ward county; *Goss, J.*

Summary action for the removal of S. S. Richardson and L. B. Carroll, county commissioners of Ward county. From a judgment of removal, they appeal.

Affirmed.

John E. Greene, for appellants. *Geo. A. McGee*, *State's Attorney*, *C. N. Frich*, *Attorney General*, and *Bosard & Ryerson*, for the state.

KNAUF, J. This is a summary action brought for the removal of three of the county commissioners of Ward county on an accusation presented by J. W. Fabrick, a person residing in that county. The accusation as filed and served consisted of 28 paragraphs, containing various charges against three of the commissioners. On January 9, 1906, the defendants filed an answer in which they

objected to each and every one of the 28 articles upon the following grounds: (1) "That the court has not jurisdiction of the subject-matter thereof, in that charges therein set forth are triable only upon an accusation presented to the court by a duly constituted grand jury of the county. (2) "That the facts set forth therein, and in each of the 28 articles, are insufficient to constitute a ground for the removal from office of the said defendants, or either of them." The lower court thereupon caused a portion of the accusation to be stricken out under the second objection above, and on February 9, 1906, defendants filed an answer denying the remainder of the charges, and a jury having been waived, the court proceeded with the trial of the defendants, and after the evidence had been adduced, the court found the defendant not guilty of any of the remaining articles, or charges, except that the defendants, Richardson and Carroll, were found guilty of the charges contained in articles 17, 25, and 26, of the accusation. Defendants appeal from the judgment.

Article 17 of the accusation stated, in substance, that the defendants unlawfully and corruptly approved and allowed a claim of the Minot Optic against said county of Ward in the sum of \$389.87, for 200 calendars, "and afterwards rescinded this action, and allowed the bill at \$150, whereas in fact and in truth, the real value of said calendars was not more than the sum of \$65, all of which the said defendants well knew." To bring article 17 within the class of accusations to be presented by a person under section 9646, Rev. Codes 1905, it is necessary to state facts, showing, not a malfeasance in office, but the charge and collection of illegal fees, a neglect of duty, or that the official has rendered himself incompetent. The facts in this article do not show it to come within either, but the facts alleged do tend to show misfeasance and malfeasance in office, and for either of those charges the accusation must be presented by a grand jury, and should have been stricken out, and the finding of the defendants guilty thereunder was erroneous. Article 25 contained no statement that the alleged illegal fees charged had been collected, and for that reason is insufficient, and does not come within section 9646, and was improperly presented, and the order and judgment, finding the defendants guilty under this article was erroneous. See sections 9632 and 9646, Rev. Codes 1905.

The county commissioners are not liable to impeachment under the constitution, but come within the class "subject to removal * * * in such manner as may be provided by law." Two methods are provided by which the machinery of the court may be set in motion for the removal of an official not liable to impeachment. One is under section 9632, and the other under section 9646, Rev. Codes 1905. If the entire accusation under which this action was set in motion came within section 9632, then the court was without jurisdiction. Articles 17 and 25 came within section 9632. A portion of the accusation, article 26, charging the defendants with "charging and collecting" illegal fees, was properly presented, and the contention of appellants that the entire accusation must have been presented by a grand jury to give the court jurisdiction is without foundation. Section 7823, Rev. Codes 1899; section 9646, Rev. Codes 1905; *Wishek v. Becker*, 10 N. D. 63, 84 N. W. 590; *In re Marks*, 45 Cal. 199; *Enc. Pl. & Pr.* 211; *Bradford v. Territory*, 2 Okl. 228, 37 Pac. 1061; *Woods v. Varnum*, 85 Cal. 639, 24 Pac. 843; *Fuller v. Ellis* (Mich.) 57 N. W. 33; *State v. Peterson* (Minn.) 52 N. W. 655. The method for removal of public officials other than by impeachment, is left to the legislature by constitutional provision. Section 196 of the constitution of this state provides that "the governor and other state and judicial officers, except county judges, justices of the peace and police magistrates shall be liable to impeachment," and section 197 provides that "all officers not liable to impeachment shall be subject to removal * * * in such manner as may be provided by law."

Our legislature has enacted the manner (section 9632, Rev. Codes 1905) in which officials, not included in section 196 of the constitution, should be removed for malfeasance in office. It necessarily follows that articles 17 and 25 should have been stricken from the accusation for the reason that they were not presented by a grand jury. Section 9632, Rev. Codes 1905, provides: "An accusation in writing against any district, county, township, city or municipal officer, or state officer not liable to impeachment except representatives in congress and members of the legislative assembly, for misconduct, malfeasance, crime or misdemeanor in office, or for habitual drunkenness or gross incompetency, may be presented by the grand jury to the district court of the county in or for which the officer accused is elected or appointed. * * *"

Article 26 of the accusation reads as follows: "Your informant gives this court to understand and be informed that heretofore, to wit, at various meetings of said board of county commissioners, the said defendants, acting as a majority of said board have unlawfully and corruptly audited and allowed the bills of each other for services rendered by them to said county of Ward, which said bills contained charges for illegal and excessive fees, which are more particularly described as follows, to wit: * * *." Then follows a long copy list of the bills of Commissioner S. S. Richardson, for the months from January to November, 1905, inclusive, at the end of which we find the further charge: "Your informant alleges the fact to be that said defendant S. S. Richardson did not travel the number of miles, nor serve the number of days charged in said bills against the county of Ward, and that said fees so charged are illegal and excessive, and that said defendant S. S. Richardson well knew that said fees so charged were illegal and excessive. That said defendant Richardson has charged and collected from said county per diem for 30 days during the month of May, A. D. 1905, whereas in fact and in truth there are only 26 working days in said month, excluding Sundays, and that said defendant Richardson has charged and collected from said county of Ward for 31 days' services in the month of June, 1905, and that for 36 days' services in the month of July, 1905, whereas in fact and in truth there were no more than 26 working days in said months." Then follows a long copy list of bills of Commissioner L. R. Carroll, for the months from January to November, 1905, inclusive, at the end of which we find the further charge: "Your informant alleges that said defendant Carroll charged and collected from the county of Ward during the period from January 3, 1905, to November 24, 1905, for 265 days' services and 7,287 miles travel in the performance of his duties as a member of the board of county commissioners. That said fees for services and mileage are far in excess of the service actually performed and the mileage traveled. That said defendant charged and collected from said county of Ward for 27 days' services during the month of April, 1905, for 29 days' services during the month of May, 1905, for 29 days' services during the month of June, 1905, for 46 days' services during the month of August, 1905, and for 27 days' services during the month of October, 1905, and your informant alleges the fact to be that

there were only 26 working days in said month, and that under no circumstances could said defendant have worked more than 26 days during said months if he had performed services for said county each and every day thereof, excluding Sundays. Your informant alleges that said defendant Carroll charged and collected from said county for services for care of poor on the 15th and 25th days of April, in the sum of \$8, being \$4 per day, whereas the legal fees therefor are the sum of \$2 per day. Your informant alleges that said defendant Carroll charged and collected from said county of Ward the sum of \$4 for services as commissioner on the 5th day of May and the additional sum of \$4 for the same day for viewing roads, making a total charge for said day's services of \$8. Your informant also alleges that said defendant Carroll charged and collected for his services as commissioner from March 6th to March 8th, the sum of \$16, when, as a matter of fact, he was only entitled to the sum of \$12. Your informant alleges that said defendants well knew that their said fees so charged and collected were illegal and excessive, but, notwithstanding such knowledge they conspired and agreed together to audit and allow the same, contrary to the prohibition of the statute in such cases made and provided, and in violation of their official duties. * * * Further affiant sayeth not, save that this affidavit is made for the purpose of calling the attention of the court to the accusations made against these defendants with the end in view that they may be removed from their said office as county commissioners and that the court appoint some qualified attorney or attorneys to act as prosecuting officers in the matter and require said defendants to appear before said court at a time to be specified and answer said accusations as provided by law."

To come within the class of removals, which may be initiated by any person, article 26 must come under one or the other of the following three causes set out in section 9646, Rev. Codes 1905, viz: That an officer within the jurisdiction of the court has been guilty of (1) charging and collecting illegal fees for services rendered in his office, or (2) has refused or neglected to perform the official duties pertaining to his office, or (3) has rendered himself incompetent to perform his said duties by reason of (a) habitual drunkenness, or (b) other cause. This article of the accusation read in its entirety comes within the first subdivision of section 9646 above. "When an accusation in writing and veri-

fied by the oath of any person is presented to the district court, alleging that an officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered, or to be rendered in his office * * * Under this law it is sufficient to allege the charging and collection of illegal fees.

The second objection raised by the appellants to the accusation, "That the facts set forth therein * * * are insufficient," etc., is without foundation. While article 26 of the accusation is not drawn with great skill, it sufficiently states the alleged facts and circumstances to apprise the defendants of the allegations made against them. Two bills, not itemized, were contained in full in the article, the concluding part of the article specifically pointed out various alleged illegal "charges and collections" made by the defendants, the excessive per diem and mileage, the excessive time charged for, and could not but apprise a person of ordinary understanding what he must prepare to defend. Two cases are relied upon by the appellants to sustain their position that the accusation does not contain facts sufficient to constitute ground for removal from office. *State v. Friars* (Wash.) 39 Pac. 104, does not apply because therein it was charged that excessive charges were made for 82 days' service in 1893, and that said days were not necessary in dispatching the business. There is no specific months or dates or time when it was claimed the time charged for was excessive and there is a failure to specify the actual number of days necessary to transact the county business. *Smith v. Ellis* (Idaho) 6 Pac. 695, does not apply to the facts in this action because in that case neither the dates or months were given in which the alleged illegal charges were made. As sustaining the accusation on the matter of sufficiency, see, *Woods v. Varnum* (Cal.) 24 Pac. 843; *Rankin v. Jauman* (Idaho) 36 Pac. 502; *Trigg v. State*, 49 Tex. 645; 17 Enc. Pl. & Pr. 219. The accusation alleged that the appellants charged and collected illegal fees and the evidence shows that month after month, the appellants in making and presenting their bills, charged, audited, allowed, and collected per diem and mileage for one day coming to the commissioners' meetings or one day going home from the meetings, or both. That such a charge and collection was made for each month from January to November, 1905, inclusive, was pleaded, proven, and stands admitted by appellants.

It was contended by appellants in their testimony that they rightfully charged and collected per diem and mileage for one day coming to the commisisoners' meetings and per diem and mileage for one day going from the commissioners' meetings. For this charge and collection there is no warrant of law, and the charging and collecting thereof is ground for removal. Section 2613, Rev. Codes 1905 (first enacted in 1901,) fixes county commissioners' salaries as follows: "County commissioners shall each be allowed for the time they are necessarily employed in the duties of their office the sum of four dollars per day, and five cents per mile for the distance actually traveled in attending the meetings of the board, and when engaged in other official duties. * * *" Under this law there is no provision for collecting per diem for coming to or going from the commissioners' meetings. Provision is only made for mileage for travel. The per diem is for "time they are necessarily employed in the duties of their office," and five cents per mile is allowed for the "distance actually traveled in attending the meetings of the board." The appellants testified that it was and had been their custom when out on committees inspecting roads or bridges for the county, to charge the county for overtime when they drove, or rode on a train at night, and in this manner attempt to account for the fact that in some months they had charged and collected from the county per diem for more than the actual number of days in the month, or portion of months covered by the charge. Unless the contrary is fixed by statute, a day extends over the 24 hours from one midnight to the next midnight. And a county commissioner cannot charge and collect for two days' official service performed within the 24 hours from midnight to midnight, and to do so is illegal and constitutes grounds for removal from office. *Robinson v. Dunn*, 77 Cal. 473, 19 Pac. 878, 11 Am. St. Rep. 297; *Smith v. County Com.* 10 Colo. 17, 13 Pac. 917. The appellants to further justify their position professed ignorance of the illegality of such charges and maintained that it had been the custom of the commissioners to charge and collect such fees. The plea of ignorance and custom cannot excuse the act, under the facts of this case. *Miller v. Smith* (Idaho) 61 Pac. 824.

The questions of law arising in this action having been disposed of, we are now to inquire whether the evidence on the part of the state was sufficient upon which to warrant a conviction. The

state introduced in evidence the bills rendered for services by these defendants from January, 1905, to and including November, 1905. As a rule these bills were substantially as follows: "May 5th, 1905. Ward county to L. R. Carroll, Dr. April 15 to 25, care of poor, two days, 29 miles \$9.45. Apr. 18 to 29, 19 days viewing \$76.00. 642-32-10. May 1 to 5 Com. Proceedings \$20.00. Going and coming \$8.00. 54 miles \$2.70. Total \$148.25." The evidence adduced by the state showed the presentation of the bill, its audit and allowance, and the issuance of the county's warrant in payment thereof. This particular bill was for "care of poor, two days, 29 miles, \$9.45." The statute provides for but \$2 per day for care of poor, and the charging and collection of \$4 per day, therefore, was excessive (section 1868, Rev. Codes 1905) and illegal, and is ground for removal. Section 9646, Rev. Codes 1905. The charge and collection of \$4 per day for coming to and going from the commissioners' meetings is without authority of law, the mileage of five cents per mile alone being allowed for travel. Our statute, section 2613, Rev. Codes 1905 (p. 66, c. 53, Session Laws, 1901) provides for a per diem salary "for the time they are necessarily employed in the duties of their office," and five cents per mile for the distance actually traveled in attending the meetings of the board is provided. This cannot be construed to mean \$4 per day in addition to the mileage for a day to come to the meeting and a day to return. It necessarily follows that the charging and collection of a per diem charge of \$8 for two days, coming to and going from the commissioners' meetings in addition to the mileage, and this occurred monthly, was illegal, and is ground for removal from office.

The charge and collection of excessive fees for "care of poor" appears only once and then on the part of appellant Carroll. It constituted ground of removal as to him. Under the testimony, for some of the months bills were presented, audited, and allowed and collections made by defendants for per diem to themselves in excess of the number of days in the month. As in the bill set out above, the charge and collection was made for 19 days from "Apr. 18 to 29," whereas, under our law, there could be but 12 days during that time, counting both the first and last days. The charge and collection was illegal, and is ground for removal from office. It was contended by counsel for appellants that the judgment was insufficient and defective and void because it failed to assign the

grounds upon which the finding of guilty is based. Were this proceeding to remove from office under an accusation presented by a grand jury then the judgment would be insufficient for the reasons stated. See section 9632 and section 9642, Rev. Codes 1905. Section 9646, Rev. Codes 1905, provides: "The decision of the court * * * shall be guilty or not guilty," and if the accused is found guilty either by the decision of the court or by the verdict of the jury, the court shall render judgment that the accused be removed from his office, and for the costs of the action." The court found by its order that the appellants, Richardson and Carroll, were guilty as charged in the accusation, and ordered judgment of removal and ouster from the office of county commissioner of Ward county, and thereupon judgment was made and entered, removing said defendants, Carroll and Richardson from such office and taxing costs against them. It was unnecessary to enter the reasons for the judgment other than set forth in the order for judgment. The proceeding is summary and section 9646 provides a proceeding complete in itself, and an order and judgment in accordance therewith are sufficient.

The order and judgment of removal of the appellants from the office of county commissioner of Ward county, N. D., upon the grounds specified in and the proofs under article 26 of the accusation, is affirmed. The clerk of the court below, in taxing the costs for printing of respondent's brief, will deduct the cost of printing 28 pages thereof, for the reason that that number of pages of printed matter contained in the abstract were unnecessarily reprinted therein.

MORGAN, C. J., concurs. ENGERUD, J., not present or participating.

(109 N. W. 1026.)

J. L. OWENS COMPANY, A CORPORATION, v. THOMAS DOUGHTY.

Opinion filed November 19, 1906.

Sale of Personal Property — Rescission.

1. A sale of personal property followed by actual delivery cannot be rescinded unless the property be promptly returned to the seller or its return tendered and refused, or its return waived.

Same — Acquiescence After Rescission.

2. Mere words of disaffirmance followed by positive acts acquiescing in the contract, will not effect a rescission of the same.

Same — Return of Part of Property.

3. A contract of sale of personal property cannot generally be rescinded by a return or an offer to return only that part of the property unsold.

Rescission Must Be Entire.

4. A rescission of a contract must generally be of the contract in its entirety, and not that part which is advantageous to the party.

Sale — Bill of Sale — Construction.

5. A bill of sale construed, and the rights of the parties thereunder determined.

Appeal from District Court, Foster County; *Burke, J.*

Action by the J. L. Owens Company against Thomas Doughty. Judgment for defendant and plaintiff appeals.

Reversed and remanded.

Turner & Wright, for appellant.

One seeking to rescind must proceed promptly and bring his notice of election home to the other party. *Davis v. Reed*, 37 Fed. 418; *Lawrence v. Dale*, 3 Johns. Ch. 23, 71 L. Ed. 529; *Sweetman v. Prince*, 26 N. Y. 224; *Bennett v. Glaspell*, 107 N. W. 45, 15 N. D. 239; *Grymes v. Sanders*, 93 U. S. 63, 23 L. Ed. 798; *Tarington v. Purvis*, 9 L. R. A. 607.

T. F. McCue, for respondent.

Where one party to a contract fails to perform his part, the other party thereto may treat it as at an end. *Barrett v. Austin*, 31 Pac. 3; *Lake Shore Ry. Co. v. Richards*, 152 Ill. 59; *Seymour v. Detroit Copper Mills*, 22 N. W. 317.

MORGAN, C. J. Action on a promissory note for the sum of \$1,010.50 given for the purchase price of a carload of fanning mills sold and delivered to the defendant. When the sale of the machines was made, the following special agreement was entered into between the parties as a part of the written contract: "J. L. Owens Company agree to furnish canvasser to sell these mills and guarantee that said mills will be sold in four months of peddling, and at the expiration of four months all mills unsold to be sold at the expense of J. L. Owens Company. Thomas Doughty to pay said man's expenses and salary for four months, or until he discharges

him. Gilbert Glauke to be the canvasser. Salary of said man to be \$50 a month and expenses. Man to be paid only until mills are sold, or until Thomas Doughty wishes to take the responsibility of the sale of said mills, when he can discharge him; salary and expenses paid by Doughty not to exceed four months."

The answer alleges that Glauke was not furnished to the defendant as a canvasser and salesman of the mills, and that the mills were not sold within four months, in consequence thereof. That plaintiffs furnished another canvasser who was incapable of selling said machines and only sold 10 of them during about 60 days, and voluntarily quit canvassing in about 60 days. It is also alleged that the furnishing of said Glauke as a canvasser constituted the inducement for the purchase of said mills by defendant, and in consequence of the failure of said plaintiff to furnish him as a canvasser, the consideration for the contract has failed, and that defendant has on hand 28 of said fanning mills, and that the same have at all times been held subject to the order of the plaintiff. The answer further alleges that "defendant has at all times requested plaintiff to take said mills, and the defendant now tenders said 28 mills to the plaintiff. Defendant also pleads a counterclaim for damages alleged to have followed the breach of said contract by plaintiff. Such damages consist of wages paid to the canvasser furnished for 60 days, his board and team hire, in all amounting to the sum of \$340. Further damages are claimed based upon the following contentions: The machines were not sold during the four months limited in the contract. That defendant sold 22 of them, and claims \$10 per machine sold by him as a reasonable compensation therefor. Further damages are pleaded as a counterclaim growing out of the fact that plaintiff did not remove said 28 mills from the defendant's possession for two years, and that the reasonable value of their storage and for insurance, is the sum of \$100. Defendant demands judgment against the plaintiff in the sum of \$690 with costs.

There was a trial to a jury, and a verdict was returned in defendant's favor for the sum of \$85.50, and judgment rendered thereon. Plaintiff moved for judgment notwithstanding the verdict and the same was denied. Plaintiff appeals, and specifies numerous errors at the trial in the admission of evidence, and the giving of instructions, and the denying of the motion for judgment notwithstanding the verdict. The facts developed at the trial show that plaintiff failed to furnish the particular canvasser agreed upon, and that the

guaranty that the machines would be sold in four months was not complied with. Plaintiff did furnish a canvasser who worked for about 60 days, and sold 10 mills during that time, and voluntarily quit that work at the end of that time. Another canvasser was furnished who only worked a few days. Thereafter no canvasser was employed, but defendant sold 22 of the machines himself to persons who came to his place of business at Carrington. Defendant says that he made objections to plaintiff for not furnishing the man, Glauke, as canvasser, and expressed his dissatisfaction with the one furnished. Evidence introduced on plaintiff's part tends to refute these contentions.

A material question involved on this appeal is whether the defendant rescinded the contract. Defendant claims that the answer sets forth facts constituting an absolute rescission, based on the following allegations: "That defendant has on hand 28 of said fanning mills, and that the same have at all times been held subject to the order of the plaintiff. That defendant has at all times requested plaintiff to take said mills, and the defendant now tenders said 28 mills to the plaintiff."

The testimony shows that defendant told plaintiff's agent that the machines were his machines, and subject to his order, but this was not done until many of them had been sold. There was no return of any of the mills. The contract did not provide for the mode by which it could be rescinded. The provisions of the statute must therefore control, and it provides that as a condition of a rescission that everything of value received under the contract must be restored or offered to be restored, and that the rescission must be promptly made. After defendant stated to plaintiff's agent that the mills were his mills, and subject to his order, no change was made in the possession of the mills. They remained at the same place as before. Defendant continued to sell them as opportunity presented itself. The contract was thereby ratified, and continued in force. If it should be conceded, although unwarranted, that plaintiff refused to accept the mills, when told that they were his mills and subject to his order, still the undisputed fact that defendant sold some of the mills thereafter, and received benefits under such sales, refutes the claim of rescission. If a rescission was made the mills would thereafter belong to plaintiffs, and defendant had no right to sell them, nor do anything else in reference to them. By selling them and appropriating the proceeds of the sales, the claim of a prior re-

scission amounts to nothing. The plaintiff had a right to infer that the contract was in force. The mills were delivered on October 17, 1902, and the canvasser immediately commenced selling them. He continued to do so for nearly 60 days, when he quit. The defendant knew that Mulmstead was not the canvasser provided for by the contract. He accepted him, however, and says that he did so because plaintiffs agreed to furnish Glauke soon. We are satisfied that by accepting Mulmstead to sell the machines in place of Glauke, defendant has waived the contract to that extent, and could not later repudiate the contract on that ground, and thereby lay the foundation for damages for all sums that he had voluntarily paid Mulmstead for his services. Defendant was not compelled to accept Mulmstead as an agent and could have rescinded the contract for the reason that Glauke was not furnished as selling agent, if he had acted promptly. But, by acquiescing in the change and accepting his services and the benefits of his work, he lost the right to rescind the contract in toto upon the ground that 60 days after Mulmstead had ceased to work.

The note in suit was given on December 18, 1902. It was given for the purchase price of all the fanning mills delivered to defendant under the contract of October 6, 1902, and for some other articles. The giving of this note was after Mulmstead had quit working, and his inability to make a success as a canvasser had been ascertained. The giving of the note at this time was a further ratification of the contract, after defendant knew that plaintiff had violated its agreement. Nothing was done towards rescission of the contract until more than a year after the note was given, and during all of this time defendant continued to sell the fanning mills as occasion presented itself. We are convinced that there was no rescission. Hence, defendant is not entitled to recover what he paid out to the canvasser, nor for other expenditures previously stated herein. These expenditures were made by defendant with knowledge that plaintiff had not complied with its contract. The attempted rescission was not promptly made. Defendant only attempted to rescind as to the 28 machines unsold. It was too late to rescind the contract after the sale of so many of them had been made. The evidence is not definite as to how many were sold when rescission was attempted, but 32 of them were sold in all.

It is also claimed that defendant is entitled to damages for the reason that the guaranty that the mills should all be sold within four

months was not complied with. We do not think that the contention can be sustained. Under the contract, the mills were to be sold within four months. The contract is not explicit as to the party that was to sell them. The intention to be gathered from the whole contract is that defendant was to do the selling, but plaintiff was to pay the expenses thereof. The contract therefore provides what shall be done if the mills are not all sold in four months. The plaintiff must stand the expenses of all the selling. The defendant was to receive the profits after the four months, although to incur no expense. The contract therefore provided what the plaintiff was to do by way of penalty if the canvassers did not sell all the machines in four months. It is not true that plaintiff was to sell the mills during the four months after delivery. They were to be sold by the defendant. Plaintiff agreed to furnish Glauke as the canvasser, but he was defendant's agent and not plaintiff's, and was paid by the defendant. After four months the defendant was to sell the mills remaining on hand at plaintiff's expense. Plaintiff was absolved from all duty in regard to the selling of the mills after the lapse of four months, and defendant was to sell them, but was to be reimbursed for the expenses thereof. What expenses were to be allowed is not specified, but it is evident that actual expenses were intended. A rescission could not be made as to the unexecuted part of the contract under the facts of this case. Defendant could not ratify that part of the contract advantageous to him, and disaffirm the unprofitable part. This principle is elementary.

The trial court instructed the jury to allow to the defendant as a counterclaim against the note in suit what he had expended under the contract for wages of the canvasser, and for expenses for storage and other similar expenditures made by him. This was upon the theory that the defendant had rescinded the contract. As we have seen, this was error. Instead of rescinding the contract, defendant affirmed it by unequivocal acts of performance after the cause for rescission had come to his knowledge. The rights of the parties should have been determined under the contract, as it was still in force. Defendant was not entitled to his expenses for selling any of the machines during the four months prescribed in the contract. After that period, defendant's expenses in peddling or selling the machines should have been allowed. The plaintiff will be entitled to a verdict for the full amount of the note, less payments, and less such sum as the evidence will show to be defendant's expenses in

selling the mills sold after the four months. The motion for judgment notwithstanding the verdict was properly denied. The evidence did not show definitely how many machines were sold during the four months, nor how many were sold thereafter, nor what would be the actual expenses of selling them. For the error in giving to the jury instructions on the theory that the contract had been rescinded, there must be a new trial.

The judgment is reversed, a new trial granted, and the cause remanded for further proceedings according to law.

KNAUF, J., concurs; ENGERUD, J., did not take part in the decision.

(110 N. W. 78.)

CHARLES C. CONNOLLY v. T. A. LUROS, GEORGE BRENNAN AND
FARMERS' BANK OF CRARY, A CORPORATION.

Opinion filed January 23, 1907. Rehearing denied March 15, 1907.

Specific Performance — Evidence.

Evidence *held* to justify the findings of the trial court.

Appeal from District Court, Ramsey County; *Cowan*, J.

Action by Charles C. Connolly against T. A. Luros and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Townsend & Denoyer and *Burke & Middaugh*, for appellant.

McClory & Barnett for respondents.

engerud, J. This is an action in which the main relief sought is a judgment for the specific performance of a contract to convey real property. The alleged contract relied upon was oral, but plaintiff claimed there had been a sufficient part performance thereof so that it became enforceable though not in writing. The defendants, besides other pleas, denied that there had been any agreement. There was a trial by the court without a jury and judgment for the defendants. The plaintiff appealed, and demands a trial de novo.

We fully agree with the findings of the trial court that there was no agreement made as to the terms of sale. There was a sharp conflict of testimony as to what was said and done in the ne-

gotiations which plaintiff claims constituted the agreement. But even if we accept plaintiff's version of the transaction, we think the various conversations were nothing more than mere negotiations preliminary to a contemplated contract to be made when the plaintiff had examined and become satisfied with the title; and it was clearly due to plaintiff's own delay, unavoidable, perhaps, that the negotiations did not ripen into a complete agreement. It is conceded that if there was no agreement, the plaintiff has no cause of action, or right to the land, or the possession of it; and became liable to the owner for the wrongful occupation thereof. The amount of damages assessed by the court as compensation for the use is not questioned. No objection was made to the right to interpose in this action a counterclaim for damages for the wrongful occupation of the land.

The judgment is affirmed. All concur.
(107 N. W. 365.)

AMELIA TONN V. MICHEL TONN.

Opinion filed February 19, 1907.

Divorce — Appeal — Application for Temporary Alimony — Jurisdiction.

The Supreme Court has no jurisdiction, while an action for divorce is pending and untried in the district court, to entertain a motion for the allowance of counsel fees to enable counsel to prepare and present an appeal from an order of the district court requiring the husband to provide for the maintenance of the wife, pending the final determination of the action, and for counsel fees in the main case; and, if the Supreme Court had jurisdiction, it would be determining in advance of the determination of such appeal the very questions pending on the appeal, as far as they relate to maintenance.

Action by Amelia Tonn against Michel Tonn. Application for allowance of temporary alimony pending appeal from order granting temporary alimony and counsel fees.

Denied.

S. E. Ellsworth, for the motion.
Fredrus Baldwin, opposed.

SPALDING, J. The plaintiff commenced an action of divorce by service of summons and complaint, and the defendant duly answered. Subsequently plaintiff procured an order to show cause why, among other things, defendant should not be required to pay her counsel fees, and for her maintenance, pending the final determination of the action. On the hearing of the order to show cause the district court entered an order requiring defendant to make payments for both purposes. The plaintiff, not being satisfied with the sums allowed, has taken an appeal to this court from such order, and such appeal is now pending. She now comes before this court with an original application for an order requiring the defendant to pay counsel fees for preparing and presenting the appeal from the order of the district court, and for an allowance for maintenance pending the determination of her appeal from the order of the district court. She has refused to accept any benefits under the order appealed from.

While several states hold that it is within the province of the Supreme Court to grant orders for payment of counsel fees and maintenance of the wife pending an appeal from the decision in the main case, and while this court might have jurisdiction in such case, we see no reason why we should entertain a direct application for such purpose where the main action is still pending in the district court. That court still has jurisdiction and power to award to the wife any reasonable sum for attorney's fees and maintenance on application during the pendency of the appeal from the former order, and to entertain an application like this would be to assume burdens which properly may be and should be carried by the district court.

Still, further, in so far as this application relates to maintenance pending the appeal from the order of the district court, it relates to the same subject and matter which the district court has already passed upon, and which is before this court for review on appeal as to its adequacy and reasonableness under the circumstances; and for us to pass upon this application would be to prejudge the very thing that is pending on appeal. Counsel has cited us no authorities in point, and we have, after diligent search, found only one which appears to be at all applicable to the principle here involved. One case in Wisconsin (*Weishaupt v. Weihaupt*, 27 Wis. 621) at first glance appears to be identical with this, but the record is meager, and the court entered into no discussion of the question whatever, and from a careful inspection it would seem that the

whole case may have been before the Supreme Court, and that the lower court had lost jurisdiction to enter any order in the case, and, at any rate, the question of jurisdiction to entertain the motion was not raised.

We are further of the opinion that this is not one of the classes of original applications which, under the constitution and laws, can be made in the first instance to this court. This court is primarily a court of appeals, and section 4074 of the Revised Codes of 1905 provides for appeals from all orders and decrees touching the alimony and maintenance of the wife, and, as we have shown, such an appeal is now pending. This is not an application for any of the writs mentioned in section 87 of the constitution, and is not an order nor a writ necessary to the proper exercise of the jurisdiction of this court.

The motion is therefore denied. All concur.
(111 N. W. 609.)

E. E. COOK v. S. M. LOCKERBY.

Opinion filed February 20, 1907.

Mortgage — Sufficiency of Notice of Foreclosure.

1. An affidavit of publication of notice of sale in proceedings to foreclose a real estate mortgage, which recites that such notice was published "seven successive times, commencing on July 17, 1885, and ending on August 28, 1885, both inclusive, in the Lisbon Star, a weekly newspaper," is sufficient proof that it was published once in each week for six successive weeks, as required by Comp. Laws 1887, section 5414.

Same — Names of Mortgagees.

2. The mortgagees in such mortgage were designated under their firm name of Cook & Dodge, and, notwithstanding this fact, a statutory foreclosure thereof is sustained.

Appeal from District Court, Barnes County; *Glaspell, J.*

Action by E. E. Cook against S. M. Lockerby and others. Judgment for plaintiff, and defendant Lockerby appeals.

Affirmed.

Turner & Wright, for appellant.

An affidavit that a mortgage foreclosure notice was published in
"a weekly newspaper * * * * * seven times, commencing

on the 17th day of July, A. D. 1885, and ending on the 28th day of August, A. D. 1885," is not equivalent to proof that it was published "for six weeks at least once in each week." *Ullman v. Lion*, 8 Minn. 381 (Gil. 338); *Prince George's County Commissioners v. Clark*, 36 Md. 206; *Golcher v. Brisbin*, 20 Minn. 453 (Gill. 407); *Perrin v. Felters*, 35 Mich. 233.

A partnership as such is not such a legal entity as may hold title to real estate, 22 A. & E. Enc. of Law (2nd Ed.) 75; *Morrison v. Mendenhall*, 18 Minn. 232 (Gill. 212); *Kellogg v. Olson*, 24 N. W. 364; *Tidd v. Rines*, 2 N. W. 497.

John E. Green, for respondent.

The facts, that the paper was a weekly publication, that the dates of the first and last publications are given, in the absence of a showing that the notice was not given, are sufficient to establish a legal publication. *Iowa State Bank v. Jacobson*, 66 N. W. 453.

Foreclosure by advertisement of a mortgage to a firm in its firm name is sufficient. *Menage v. Burke*, 45 N. W. 155.

Where one claiming title by foreclosure, takes possession of the mortgaged premises under such claim, although a mortgagee in possession, such possession is adverse, and puts the statute of limitations in motion. *Nash v. Northwest Land Co.*, 108 N. W. 792, 15 N. D. 566; *Russell v. Akeley Lumber Co.*, 48 N. W. 3; *Rogers v. Benton*, 39 Minn. 39.

FISK, J. This is an action to determine adverse claims to certain real property in Barnes county. The appellant, Lockerby, one Moses Vachon, and all persons unknown claiming any interest in the real property in dispute, were made defendants. The defendant Vachon filed a disclaimer, and the action was dismissed as to the unknown defendants. Judgment was rendered in plaintiff's favor in the District Court, adjudging him to be the owner in fee of the land described, and also adjudging that neither of the defendants has any right, title, or interest in such land, and quieting the title thereto in plaintiff. From this judgment the defendant Lockerby appealed to this court, and asked a review of the entire case.

The facts, briefly stated, are as follows: On September 14, 1882, the defendant, Moses Vachon, being the owner in fee of the property in dispute and being indebted to the co-partnership of Cook & Dodge, of Davenport, Iowa, in a large sum, executed and delivered

his mortgage upon the property in question to such co-partnership in its firm name of Cook & Dodge, such co-partnership consisting of E. E. Cook, the plaintiff herein, and one F. L. Dodge, to secure such indebtedness. Such mortgage contained the usual power of sale in case of default. In October, 1884, defendant Lockerby acquired title to the property by deed of conveyance from defendant Vachon and wife, and is now the owner thereof, unless he was divested of such title by the foreclosure of the mortgage above mentioned, executed by his grantor; and this brings us to the real controversy between these parties, which is as to the validity of these foreclosure proceedings. In July, 1885, proceedings were instituted by the firm of Cook & Dodge to foreclose said mortgage by advertisement under the power of sale contained in said mortgage, and pursuant thereto notice was caused to be published in the Lisbon Star, a weekly newspaper of general circulation published at Lisbon, in said county. As stated in the affidavit of publication, such notice was published "seven consecutive times, commencing on the 17th day of July, 1885, and ending on the 28th day of August, 1885, both inclusive." The notice, as published, was signed: "Cook & Dodge, Mortgagees. Francis & Francis, Attorneys for Mortgagees." The plaintiff, Cook, was the purchaser at the foreclosure sale, and in due time acquired a sheriff's deed under such foreclosure.

Two objections are made to the validity of this foreclosure. It is appellant's contention that the affidavit of publication is fatally defective, because it fails to recite that the notice was published "once in each week for six successive weeks," as required by law at the date of such foreclosure, and that a statement in the affidavit that such notice was published "seven successive times, commencing on July 17, 1885, and ending on August 28, 1885, both inclusive," is not the equivalent thereof. The affidavit recites that the newspaper, "the Lisbon Star," is a weekly newspaper, and that the printed notice thereto annexed was printed therein "seven consecutive times, commencing on the 17th day of July, 1885, and ending on the 28th day of August, 1885, both inclusive." We think the affidavit was sufficient. The expression "weekly newspaper" can have but one meaning, which is that it is a paper published once in each week, and a statement in the affidavit of publication that the notice was published in such paper seven successive times, commencing on July 17th and ending on August 28th, both inclusive, unquestionably means that such notice was published in each issue of such paper

between said dates, or, in other words, that it was published once in each week during such time. In the absence of proof to the contrary, we think it should be presumed that said paper, as its name implies, was published once in each week during the time in question. The Supreme Court of South Dakota in *Bank v. Jacobson*, 8 S. D. 292, 66 N. W. 453, had occasion to pass upon a similar question, and we unhesitatingly approve the reasoning of that court. In that case, as in this, the sufficiency of an affidavit of publication was challenged. It recited that the summons was published in a weekly newspaper for "seven successive issues, to wit: The first publication being made on December 25, 1891, and the last publication on February 5, 1892." We quote from the opinion as follows: "Commencing on December 25, 1891, and concluding on February 5, 1892, the summons was published in a weekly newspaper for seven successive issues. The ordinary acceptance of the expression 'weekly newspaper' unerringly conveys the idea of a paper issued once a week, and the phrase 'for seven successive issues,' when used with reference to publication in a weekly newspaper simply means that such publication appeared in the columns thereof once each week for seven successive weeks; and when the date of the first and last publication is given, as in the affidavit before us, the above conclusion is irresistible."

It is appellant's second contention that the foreclosure proceedings were void for the reason that the published notice of sale recited the names of the mortgagees as "Cook & Dodge" merely, without disclosing the Christian names of the partners in such firm, and that the notice was signed in the same manner. Subdivision 1 of section 5415, Comp. Laws 1887, in force at the date of this foreclosure, provides that the notice of sale must specify "the names of the mortgagor and the mortgagee." Was the notice in conformity with such statute? Counsel concede, for the purposes of this case, that the mortgage of real estate taken in the name of a firm is effectual to create a lien upon the premises for the benefit of the members of the partnership; but they argue that such a mortgage cannot be foreclosed by advertisement under the power of sale, but must be foreclosed by action, in which the names of the persons composing the partnership must be alleged and proved, and, finally, they argue that, even if it may be foreclosed by advertisement, still, in any event, it cannot be so foreclosed unless the published notice of sale shows the full names of the mortgagees, citing *Gille v. Hunt*, 29

N. W. 2, 35 Minn. 357, and *Foster v. Trowbridge*, 40 N. W. 256, 39 Minn. 378. The first case cited furnishes no light upon the question here involved. In that case the mortgage ran to "D. B. Dorman & Co.," and the case turned mainly on the question, in whom was the legal title to the mortgage? In other words, who was in law the mortgagee? Was it D. B. Dorman, or was it the partnership, or the individuals composing the firm of D. B. Dorman & Co.? And the court held that D. B. Dorman was the only person through whom legal title could be made under the mortgage, and hence that he held the legal title. The point here under consideration was not involved in that case. The case of *Foster v. Trowbridge* does not support appellant's position. In that case the mortgage ran to the firm of Blake & Elliott. The point was made that the mortgage, being given to a partnership, was ineffectual, and passed no interest in the land, and, after reviewing prior decisions in that state holding that a conveyance or mortgage of real estate cannot be made to a partnership as such, but must be made to some person, for the reason that a partnership, as such, cannot take and hold the legal title to real estate, the court said: "But the court further decided that the grantee in a conveyance need not be named, provided he be described with sufficient definiteness and certainty, and that, therefore, where the style of a partnership is inserted as grantee, and it contains the name or names of one or more of the partners, the legal title will vest in the partner or partners named. That rule would sustain this as a mortgage to the partners who are named in the partnership style, if it were necessary in this action that the mortgage should have the characteristics of a conveyance." As we construe this language, there is nothing holding that such a mortgage as the one in the case at bar could not be foreclosed by advertisement.

In the later case of *Menage v. Burke*, 45 N. W. 155, 43 Minn. 211, 19 Am. St. Rep. 235, the same court, in unmistakable language, put at rest the question in that state. In that case the question of the right to foreclose such a mortgage by advertisement was squarely before the court, and that tribunal, after referring to numerous prior decisions of that court bearing upon the question, said: "The general doctrine there expressed as to the insufficiency of such an instrument, not aided by a court of equity, to transfer a legal title, has been declared to be subject to the qualifications that, where a partnership name thus employed contains the name or names of one

or more of the partners, the instrument will have legal effect as a conveyance or mortgage to the party or parties thus named. This controls the decision of this case. While it is necessary to the legal validity of such an instrument that there be a grantee having a legal existence, capable of taking, and certainly designated or so designated that his identity can be certainly ascertained, these conditions are complied with in this case; resort being had, as may be done, to facts beyond the instrument for the purpose of applying the description or designation of the persons named to the persons so described. *Wakefield v. Brown*, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671; *Morse v. Carpenter*, 19 Vt. 614. By this means it was ascertained that the 'Farnham' and 'Lovejoy,' of the county of Hennepin and state of Minnesota, named in the mortgage as the 'parties of the second part,' were the persons of those names who were the members of the business co-partnership of Farnham & Lovejoy; that is, Sumner W. Farnham and James A. Lovejoy. With this light thrown upon the instrument it is most reasonable to construe it as made to the two persons thus named, and not merely to the partnership, in the sense of the business relation existing between those persons. Our conclusion is that the mortgage was effectual in law, and that the statutory foreclosure by the exercise of the power of sale was valid."

In the published notice of sale in the above case the full names of the partners were given in parenthesis immediately following the partnership name; but we do not consider that this fact differentiates the two cases, nor was that fact emphasized as important in the decision of that case. We do not think that more exactness was required in designating the mortgagees in the notice of sale than was required in designating them in the mortgage, and, if the designation in the mortgage was insufficient, it could not be cured or aided by a proper designation in the notice of sale. We are of the opinion, and so hold, that the foreclosure proceedings were valid, and operated to divest defendants of their title and vest the same in plaintiff.

The judgment of the district court was therefore correct, and is accordingly affirmed. All concur.

(111 N. W. 628.)

JOHN VALLELLY AND B. F. BROCKHOFF v. THE BOARD OF PARK
COMMISSIONERS OF THE PARK DISTRICT OF THE CITY OF GRAND
FORKS, ET AL.

Opinion filed February 20, 1907.

Municipal Corporations — Debt Limit — How Computed.

1. Debts of a city contracted for paving and sewer purposes are not to be computed in ascertaining whether the debt limit has been exceeded. There is no general liability against the city for such indebtedness, except for the one-fifth portion of the cost of paving.

Same.

2. Bonds issued by an independent school district of the city of Grand Forks are not to be computed as debts of the city in ascertaining whether the debt limit has been exceeded.

Constitutional Law — Delegation of Legislative Power.

3. A law empowering a city council to determine by a vote whether the city will avail itself of the provisions of the law is not unconstitutional as a delegation to the council of legislative power.

Same.

4. The fact that the 1905 law (Laws 1905, page 256, chapter 143) creates a board to be appointed by the council whose powers over the control and government of parks are the same as those conferred by law upon the city council by former laws, does not render the 1905 law invalid.

Municipal Bonds — Power of Municipality to Provide Interest.

5. A municipality has power to provide for the payment of annual interest on bonds to be issued by it, although the law authorizing the issue of such bonds does not expressly authorize it to make provision for the payment of such bonds or annual interest thereon.

Constitutional Law — Levy of Tax by Board Not Responsible to People.

6. An act of the legislative assembly authorizing a board appointed by the city council without the consent of the people to levy general taxes is unconstitutional as a delegation of legislative power.

Appeal from District Court, Grand Forks county; *Fisk, J.*

Action by John Vallelly and another against the board of park commissioners of the park district of the City of Grand Forks and others. From an order sustaining a demurrer to the complaint, plaintiffs appeal.

Reversed.

George A. Bangs, for appellants.

If an independent board is in fact an agency of the municipality, the debts created by it are the debts of such municipality and must be considered in fixing its constitutional debt limit. Gray on Limitation of Taxing Power 1110; Wilcoxon v. City of Bluffton, 54 N. E. 110; Orvis v. Park Commissioners, 56 N. W. 294.

Delegation of taxing powers must be to boards responsible to the people. 1 Cooley on Taxation p. 101; State v. Des Moines, 72 N. W. 639; Lipscomb v. Dean, 1 Lea, 546; Park Commissioners v. Detroit, 28 Mich. 227; Waterhouse v. Board, 8 Heisk. 857; Hinze v. Poe, 92 Ill. 406.

Two distinct municipal bodies cannot exercise the same powers, jurisdiction and privileges at the same time in the same territory. 1 Dillon Mun. Cor. (4th Ed.) Sec. 184; Wilcox on Municipal Cor. 27; Grant on Corporations 18; 20 Ency. of Law (2nd Ed.) 1150; 15 Am. and Eng. Enc. (1st Ed.) 1007; Taylor v. Ft. Wayne, 47 Ind. 274; Park Com. v. Chicago, 152 Ill. 392.

Scott Rex, for respondent.

Liability for expenditures upon property for specific benefit received are not included in general municipal indebtedness. Cooley on Taxation (3rd Ed.) 175.

Limitations upon the power to incur municipal indebtedness applies only to the municipality, and not to tax-levying bodies with the same territorial jurisdiction. Gray on Limitation of Taxing Power, Sec. 2148; Hyde v. Ewert, 91 N. W. 474; Wilson v. Board of Trustees, 27 N. E. 203; Adams v. East River Institute, 136 N. Y. 52, 32 N. E. 622.

A state can delegate taxing powers to a board appointed by another board. Redmon v. Chacey, 7 N. D. 231, 73 N. W. 1081; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 941; Hagar v. Reclamation District, 111 U. S. 728, 28 L. Ed. 569; State v. West Duluth Land Co., 78 N. W. 115; Mayor v. State, 15 Md. 376, 74 Am. Dec. 572; State v. District Court, 22 N. W. 625; Brodbine v. Inhabitants of Revere, 66 N. E. 607; Stone v. Charlestown, 114 Mass. 214; West Chicago Park Commissioners v. City of Chicago, 38 N. E. 697; West Chicago Park Commissioners v. Sweet, 47 N. E. 728; West Chicago Park Commissioners v. Farber, 49 N. E. 427; Turner v. City of Detroit, 62 N. W. 405; Commissioners v. Common Council, 80 Mich. 667, 45 N. W. 508; State v. George, 29

Pac. 356; *Oren v. Bolger*, 87 N. W. 366; *Territory v. Scott*, 3 Dak. 357, 20 N. W. 401; *City of Little Rock v. Town*, 79 S. W. 785.

Power to issue bonds carries with it everything necessary to be done in connection therewith. 2 *Lewis' Southerland Statutory Construction*, Sec. 510; 27 *Am. and Eng. Enc. of Law* (2nd Ed.) 872; *Cooley on Taxation* (3d Ed.) 467.

MORGAN, C. J. This is an action brought to restrain the board of park commissioners of the city of Grand Forks from issuing bonds in the sum of \$25,000 to be used for park purposes in said city. The action is brought by the plaintiffs as electors and property owners of said city. The park board commissioners were appointed by the city council of the city of Grand Forks under chapter 143, p. 256, of the Laws of 1905, entitled "An act creating park districts and for the government thereof, creating a board of park commissioners, conferring power and authority upon such board and district and providing rules for the government thereof." Section 1 of said act provides that any incorporated city in the state "may by a two-thirds vote of its council by yeas and nays, at a regular meeting thereof take advantage of the provisions of this act." Section 2 provides that "any city desiring to take advantage of this act shall do so by ordinance expressing its desire and intent so to do, whereupon the territory embraced in such city shall be deemed and it is hereby declared to be a park district of the state of North Dakota." Section 3 provides that each Park District shall be known as "Park District of the city," and as such "shall have a seal and perpetual succession with power to sue and be sued; contract and be contracted with; acquire by purchase, gift, devise or otherwise and hold, own, possess and maintain real and personal property in trust for the purpose of parks, boulevards and ways and to exercise all the powers hereinafter designated or which may be hereafter conferred upon it." The park commission is further empowered by the act to condemn land for park purposes, and is given sole and exclusive authority to maintain, govern, and improve the same and to lay out, grade, pave, or otherwise improve any street in, around, or through said park and to erect, maintain, and govern all buildings and pleasure grounds in said park; to pass ordinances necessary for the regulation and government of the park and to enforce the same; to levy special assessments on all property specially benefitted by the establishment of said park; to appoint such engineers, surveyors, clerks, and other officers, including such

police force as may be necessary, and define their duties and fix their compensation; to issue negotiable bonds of the park district in a sum not exceeding two per cent of the value of the taxable property therein situated for the purchase of lands for such park and the improvement thereof, and, upon an affirmative vote of the electors of such district, such bonds may be issued in the aggregate not to exceed 5 per cent of the assessed value of such property. Section 5, subd. 7 (page 258), provides that the park board shall have power to "levy taxes upon all the property within said district for the purpose of maintaining and improving said parks, boulevards and ways and to defray the expenses of said board." The indebtedness of the park district is by the act expressly limited to 5 per cent of the valuation of the assessable property therein. The park commission initiated proceedings to issue \$25,000 bonds under the provisions of this act. The plaintiff procured a preliminary injunction restraining it from issuing the bonds. The defendant demurred to the complaint on which the injunctive order was procured, and the trial court sustained the demurrer. The plaintiffs have appealed from the order sustaining the demurrer. The objections urged by the plaintiffs against the law under which the defendants are proceeding and against the contemplated proceedings of the park commission are numerous and will be considered in the order in which they are presented.

It is first contended that the bonds proposed to be issued will create a debt against the city of Grand Forks in excess of the debt limit. Both parties concede that the proposed indebtedness by the issue of these bonds will be an indebtedness of the city of Grand Forks. Whether it will exceed the debt limit will depend upon the fact whether the debts of the independent school district of the city of Grand Forks and the city indebtedness created by the issuing of paving and sewer bonds or warrants are debts of the city within the meaning of the constitution limiting the indebtedness to be incurred by cities. It is also conceded that one-fifth of the bonds issued by the city for paving its streets is a city debt proper and to be computed as such in determining what the debts of the city are. The paving and sewerage bonds or warrants were issued under the laws authorizing cities to issue such bonds or warrants. These laws expressly provided for the payment of the costs of these improvements by assessments to be made against the property improved, and such assessments, when paid into the treasury, constituted a fund out of

which the warrants issued were to be paid. The statute (chapter 41, p. 47, Laws of 1897) expressly provided that upon payment by the city of one-fifth of the cost of paving such payment should be considered a full satisfaction of all claims against the city for such paving. The contracts for the paving and sewers expressly stated that the city assumed no liability, and without such provision we are satisfied that the acts under which these improvements were made and the indebtedness incurred cannot be construed, except as to negative such general liability. The contracts having been entered into under these acts, the holders of the warrants can claim no rights thereunder not based on the provisions of these laws. They contracted for a lien and payment out of a particular fund, and cannot claim a general liability unless the city wrongfully diverts this fund. It is generally held that constitutional provisions limiting corporate indebtedness are held not to apply to assessments upon property for improvements. *Cooley on Taxation* p. 175; *Davis v. Des Moines*, 71 Iowa 500, 32 N. W. 470; *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.

It is also claimed that the bonded indebtedness of the independent school district of the city of Grand Forks should be included in the computation of the city's indebtedness. The boundaries of this school district are coterminous with the territory embraced in the city. The functions of the school district are entirely separate from those of the city. The scope of the powers of the school district are outside that of the city municipal government proper. It acts independently under express statutory authority, and is in no sense an agent of the city. The indebtedness inhibited by the constitution is that contracted by the city for its own purposes, and does not refer to the indebtedness of the school district, an independent and distinct corporation organized for a special purpose not within the province of the city government proper. The precedents generally are to that effect. *Gray on Limitation of Taxing Power*, sections 2148, 2101; *Wilson v. Board*, 133 Ill. 443, 27 N. E. 203; *Adams v. East River Institute*, 136 N. Y. 52, 32 N. E. 622; *Hyde v. Ewert*, 16 S. D. 133, 91 N. W. 474; *Kennebec Water District v. Waterville*, 96 Me. 234, 52 Atl. 774; *Tuttle v. Polk*, 92 Iowa, 433, 60 N. W. 733. There is therefore no force in the contention that the debt limit will be exceeded by the issue of the proposed bonds. Adding the amount of the proposed bonds to the city's present indebtedness, there is still left a considerable sum over

and above the aggregate 12 per cent limit of debts that can be legally imposed upon the city. This would be true even if the park district commissioners were to issue bonds to create an indebtedness equal to 5 per cent of the valuation of the property; that being the aggregate percentage of indebtedness permitted by the act of 1905.

It is claimed by the appellants that the act is void because it creates a municipal corporation authorized to exercise powers over territory under the control of the city council, and the two corporations cannot exercise the same powers coextensively over the same territory. It is true that the city council had authority to lay out parks, and make rules for the government thereof. The city council adopted the provisions of the 1905 law by express action, and thereby surrendered all control over the parks of the city. Having done so, the law became operative, and the city council was excluded from any authority over the park conferred upon the park district board by the 1905 law. This law by implication repealed the prior law so far as the former laws conferred authority upon the park board to perform duties that were before vested in the city council. We find no case holding special park laws inoperative for that reason, and the objection would lie to all laws providing for the government and control of parks in cities. As to certain matters, the legislature undoubtedly has power to classify or subdivide powers of local government, and to place the power of such government in different agencies or instrumentalities. The power to regulate and govern parks in cities is very generally conferred upon special boards. It is further claimed that the act delegates to the city council legislative power; that is, the power to declare whether the act shall become operative or not. The act is a complete act, and was such when it was approved by the governor. It is not denied that a law complete in itself may be made to become operative upon the happening of a certain event or contingency. The claim is that the happening of such event or contingency must be determined by the people by vote, and that it cannot be left to the action of the city council. The law is a general law, and affects all cities of the state. The city council of Grand Forks simply elected, as it was authorized to do, whether the provisions should be put in force and become applicable to that city. A similar question has been decided by the court recently, and the conclusion reached that the county commissioners were properly authorized to determine whether a law prescribing

the manner of collecting taxes should become applicable to the county over which they had jurisdiction. *Picton v Cass Co.*, 13 N. D. 242, 100 N. W. 711. In that case the question was carefully considered and the authorities collected, and this makes it unnecessary to further discuss the question at this time.

The act in question authorizes the issuing of bonds, but makes no provision for the raising of funds annually or otherwise for the payment of interest on the same, or for the ultimate payment thereof. It is claimed that this is in violation of section 184 of the constitution, making it incumbent on any city, county, township, town, school district, or any other political subdivision incurring any indebtedness to make provision for payment of the interest annually and of the principal when due. Conceding that this section applies to park boards, we do not think that the law is invalid for that reason, nor that the proceedings should be restrained on that ground. The act gives express power to incur a bonded indebtedness in a limited amount. This is an implied authorization to make provision for the payment of the same. The express power to incur an indebtedness is held to include within such power the power to do all things necessary to effectuate the purpose of the act. *Dillon on Mun. Corp.*, section 741; 1 *Cooley on Taxation* (3d Ed.) p. 467; *Hall v. Chippewa Falls*, 47 Wis. 267; 2 N. W. 279.

A more perplexing question remains to be disposed of. The act authorizes the park board commissioners to levy annual taxes for the purpose of making effectual the objects thereof. The people have never had an opportunity directly to adopt the act by vote nor had they any direct voice in the appointment of the commissioners; they being appointed by the city council, without any right on the part of the people directly to assent to or approve of such appointments. In other words, the taxing power is conferred upon a board appointed by a city council without the assent of the people. The contention is that the power to levy a tax cannot be delegated to a person or body in whose appointment the people have not directly assented by popular vote. The taxing power is vested by the constitution in the legislature. Section 130 of the constitution reads as follows: "The legislative assembly shall provide by general law for the organization of municipal corporations, restricting their powers as to levying taxes and assessments, borrowing money, and contracting debts," etc. It is conceded, and could not reasonably be doubted, that the power to levy taxes is a legislative power.

The legislative power is by the constitution vested in the senate and house of representatives. Whether the legislature can enact a law authorizing a person or body not elected by the people, or appointed without their assent, to levy taxes, is the question to be determined. This raises a constitutional question, which should be determined with caution. Unless such a law is clearly repugnant to some constitutional provision, it should be sustained. It is a general principle that legislative powers cannot be delegated. A general exception exists to the effect that legislative powers may be delegated in reference to matters of local government or concern. The power of levying taxes by municipal corporations or other governmental agencies may be delegated; and section 130 of the constitution plainly recognizes the power of the legislature to delegate such power to municipal corporations. Under this section the legislature must provide for the organization of municipal organizations, and restrict the power of such corporations in levying taxes. This shows that taxation matters for local government may be delegated to municipal corporations. The park board would probably be deemed a municipal corporation within the meaning of this section if the people had been given a voice in its election. Whether that is true or not, and what the precise character or legal status of the park board commission is, is immaterial.

It has become a well recognized principle of constitutional law that local boards and councils elected by the people are bodies to which the power to tax may be delegated. This is so upon the principle that the legislative power to levy taxes rests with the people; and, so long as the people have a voice in the selection of bodies to which the power to tax is delegated, the constitutional restriction is not violated. The power of the legislature to delegate the authority to levy taxes is generally held to be limited to boards or councils elected by the people, and is not sanctioned when delegated to those appointed, when the appointment has not been assented to by a vote of the people. This limitation is recognized under the principle that all powers of taxation are reposed in the people, and, unless the people assent by vote to the appointment or election of the taxing authorities, the law authorizing such powers of taxation to those not thus assented to is repugnant to the constitution, and not to be upheld. The power to levy taxes is one of the most important of legislative functions. If abused, it may amount to a practical confiscation of property. A power so far-reaching should

not be reposed in any one not directly responsible to the people. If appointed by the people, and abuses follow, a remedy by removal is in their hands; otherwise, redress is so remote as to be without practical results. Regardless of section 130 of the constitution, the delegation of the taxing power to a person or board without some assent by the people could not be sustained. The power to tax is a legislative power, and cannot be delegated to boards or commissions whose appointment has not been in some way assented to by the people. We deem this interpretation of the constitution sound, and that it should not be deviated from.

These principles are sustained by the authorities generally. Judge Cooley, in his great work on taxation, says on page 81: "It is a general rule of constitutional law that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other. This is a principle which pervades our whole political system, and, when properly understood, permits of no exception, and it is applicable with peculiar force to the case of taxation. The power to tax is a legislative power. The people have created a legislative department for the exercise of the legislative power, and with that power lies the authority to prescribe the rules of taxation, and to regulate the manner in which those rules shall be given effect. * * * There is, nevertheless, one clearly defined exception to the rule that the legislature shall not delegate any portion of its authority. The exception, however, is strictly in harmony with the general features of our political system, and it rests upon an implication of popular assent, which is conclusive."

In *State v. Mayor of Des Moines*, 103 Iowa 76, 72 N. W. 639, 39 L. R. A. 285, 64 Am. St. Rep. 157, it was said: "We say, then, that there is an implied limitation upon the power of the legislature to delegate the power of taxation. This, of necessity, must be so; otherwise, the legislature might clothe any person with the power to levy taxes, regardless of the will of those upon whom such burdens would be cast, and such person might be directly responsible to no one. * * * If the power to tax may, then, by them be vested in a board of library trustees against the will of the people, it may be reposed in any other body which is not directly accountable to the people." In *Parks v. Board of Commissioners* (C. C.) 61 Fed. 436, it was said: "* * Self-taxation, or taxation by officers chosen by or answerable to those directly interested in the district

to be taxed, is inseparable from that protection of the right of property that is either expressly or impliedly guaranteed by all written constitutions under our system of government. Of all the powers of government the one most liable to abuse is the power of taxation. If placed in hands irresponsible to the people of the district to be taxed, its abuse is a mere question of time. * * * The act is a plain violation of the principle of self-taxation, and a clear invasion of the right of property. The legislature is not the fountain—not the source—of power. Under our system of government, the legislature can only exercise such powers as the people have delegated to that body, either expressly or by necessary implication, by the constitution. All rights not so delegated are retained by the people.” In *Harward v. Drainage Co.*, 51 Ill. 130, it is said: “The power of taxation is, of all powers of government, the one most liable to abuse, even when exercised by the direct representatives of the people; and, if committed to people who may exercise it over others without reference to their consent, the certainty of its abuse would simply be a question of time. No person or class of persons can be safely intrusted with irresponsible power over the property of others, and such a power is essentially despotic in its nature, and violative of all just principles of government. It matters not that, as in the present instance, it is to be professedly exercised for public uses by expending for the public benefit the tax collected. If it be a tax, as in the present instance, to which the persons who are to pay it have never given their consent, and imposed by persons acting under no responsibility of official position, and clothed with no authority of any kind, by those whom they propose to tax, it is to the extent of such tax, misgovernment of the same character which our forefathers thought just cause of revolution. In *Parks v. Commissioners*, *supra*, it is further said: “Does the constitution of the state of Kansas authorize the legislature to delegate the power of taxation either to the signers of these petitions or to these road commissioners? Can a tax be absolutely forced upon these taxpayers of the county, either by the individuals or by officials in whose appointment they have had no voice? The power of taxation is a power inherent in all governments. In a constitutional government the people, by the constitution, confer it on the legislature. It is one of the highest attributes of sovereignty. It includes the power to destroy. It appropriates the property and labor of the people taxed. Unrestrained power of taxation necessarily leads to

tyranny and despotism. Hence, in all free governments, the power to tax must be limited to the necessities for the purposes of government, and the agencies for local taxation should be fixed and their powers limited by organic law; and they should be so selected as to be directly answerable for their official acts to their local constituencies or districts to be taxed. If they act corruptly, those directly interested may then remove them and appoint others. If those directly interested have no voice in their appointment, or power to remove them, they have no means of correcting their abuses."

In a concurring opinion to *People v. Common Council*, 28 Mich. 228, 15 Am. Rep. 202, Justice Campbell said: " * * * I think the very essence of municipal existence consists in a government which allows no discretionary power beyond that of a mere administration to be exercised without the immediate or ultimate control of the freemen or their immediate representatives. A city is, and must be, as I conceive, a unit for purposes of government; and all bodies employed in the service of the municipality, and not directly representing the freemen, must act as agencies subordinate to the council. If powers in any way involving the municipal prerogative can be given to any bodies except the common council, to the exclusion of any regulation or control of that body, they can all be so given, and the people may be entirely deprived of representative government. It is a misnomer to apply that term to a system where there is any legislative power over which the people's representatives have no control. A school district is as well organized a municipality as a city, and may coexist with it in territory, in whole or in part, as a city may cover the territory of a county wholly or partially. There is no incompatibility between them, and both are separate, and in some sense independent, popular representative bodies, exercising different functions. The duties of the others are no part of the ordinary concerns of town or city corporations. But from time immemorial every municipal government, properly so called, and acting within its peculiar sphere, has acted through its common council, composed either of the burgesses or their representatives, subject in some cases to checks and vetoes, but not subject to legislation or final action in defiance of their own decisions. Their supremacy cannot be given up by themselves any more than it can be taken from them. No doubt the state can limit their powers, but it cannot transfer them. The appointment and incorporation of boards as mere agencies is competent, and may be very convenient. But making

them anything but agencies is a direct invasion of representative government, and would bring into existence a class of cities unknown to our constitutions, and very different from the municipal corporations recognized by our constitution as the authorized recipients of local legislative power." See, also, Cooley on Cons. Lim. p. 163, and cases cited; Dillon on Mun. Corp., section 746, and cases cited; Gray on Lim. of Taxing Power, section 552; *Waterhouse v. Board*, 8 Heisk. (Tenn.) 857; *Hinze v. People*, 92 Ill. 406. We are forced to the conclusion that the act in question is repugnant to the constitution as delegating the power to levy taxes to a board appointed without the assent of the persons whose property is to be taxed.

Order reversed. All concur.

FISK, J., being disqualified in this case, Judge TEMPLETON, of the First Judicial district, sat by request.
(111 N. W. 615.)

O. W. KERR v. J. M. ANDERSON.

Opinion filed February 20, 1907.

Bills and Notes — Purchaser in Due Course — Evidence.

1. An indorsee of a promissory note can recover thereon without showing that he purchased the same in the due course of business, in the absence of any showing that he did not purchase the same in due course.

Same — Presumption of Indorsee's Good Faith.

2. A legal presumption exists that the indorsee purchased the same in due course of business, and this presumption continues, unless his title is shown to be defective through fraud or other reason.

Judgment Notwithstanding the Verdict.

3. A judgment notwithstanding a verdict will not be granted in every case where a directed verdict is erroneously denied. It is only when there is no reasonable probability that the defects in proof or pleading necessary to sustain the verdict can be remedied on another trial that such judgment will be ordered.

Appeal from District Court, McLean county; *Winchester, J.*

Action by O. W. Kerr against J. M. Anderson. Judgment for defendant, and plaintiff appeals.

Reversed and remanded.

M. C. Spicer and Turner & Wright, for appellant.

Where a note is admitted in evidence without objection, proof of its execution is not necessary. *Park v. Robinson*, 91 N. W. 344; *Caledonia Gold Mining Co. v. Newman*, 14 N. W. 426; *Pitts Agricultural Works v. Young*, 62 N. W. 432; *Morris v. Henderson*, 37 Miss. 492; *Price v. Scott*, 13 Wash. 574, 43 Pac. 634; *Drew v. Drum*, 44 Mo. App. 25; *Parrott v. Shearer*, 17 Mich. 448.

George P. Gibson, for respondent, and *James T. McCulloch*, of counsel.

It is error to refuse to direct a verdict for a party when upon the evidence it must be set aside if returned for him. *Bowman v. Ep-pinger*, 1 N. D. 21, 44 N. W. 1000; *Thompson on Trials*, sections 2247 and 2249; *Star Wagon Co. v. Matthiessen*, 14 N. W. 107; *Am. & Eng. Enc. Pl. and Pr.* p. 81; *Pleasants v. Fant*, 22 Wall. 116, 89 L. Ed. 780; *Vickery v. Burton et al.*, 6 N. D. 245, 69 N. W. 193.

MORGAN, C. J. Action upon a promissory note by the plaintiff, as indorsee, against the defendant, as maker thereof. The complaint alleges the execution and delivery and non-payment of the note at maturity, and that the same was duly indorsed to the plaintiff before maturity for a valuable consideration in due course of business. The answer is a general denial. A jury was impaneled. Plaintiff established the due indorsement of the note by the payee, and offered the note in evidence, which was received without objection, and thereupon rested. Defendant rested without offering any evidence. Plaintiff moved the court to direct a verdict in his favor, and the motion was denied. The defendant then moved for a directed verdict in his favor, which was granted. Plaintiff excepted to the rulings on each of these motions. Plaintiff thereafter moved for a judgment notwithstanding the verdict, and for a new trial. Both motions were denied. Plaintiff appeals from the order denying these motions.

The record does not disclose the grounds upon which the trial court granted defendant's motion for a directed verdict. In their printed argument, the defendant's attorneys attempt to sustain the trial court's action upon the ground that plaintiff offered no evidence to show that he was an innocent purchaser of the note before maturity. It was not necessary to offer such evidence. The presumption is that the indorsement was made in the regular course of business. The statute expressly so declares, and every holder of nego-

tiable instruments is deemed *prima facie* to be a holder in due course, unless the title of the person negotiating the instrument is shown to be defective for fraud or other reasons. When this is shown, the burden is then upon the holder to show that he took the instrument in due course. Section 636, Rev. Code 1905. This court has often held that the holder of a negotiable instrument is not primarily bound to establish that he is an innocent purchaser. *Shepard v. Hanson*, 9 N. D. 249, 83 N. W. 20; *Id.* 10 N. D. 194, 86 N. W. 704. Plaintiff produced the note in court duly endorsed, and by so doing established *prima facie* that he acquired title thereto in the due course of business. *Daniel on Neg. Ins.*, section 812, and cases cited.

The fact that plaintiff alleged in his complaint that the note was purchased by him before maturity did not make it incumbent on him to establish that fact by evidence. The statutory presumption was in force with or without such allegation. It was therefore error to direct a verdict in defendant's favor. Plaintiff requests this court to order judgment in his favor notwithstanding the verdict. This is not a proper case for such a judgment. Defendant may be able to show upon another trial that the allegations of the complaint are not true. It is only where there is no reasonable probability that a different showing can be made on another trial, by amendment or evidence, that a judgment notwithstanding the verdict may be ordered. *Richmire v. Elevator Co.*, 11 N. D. 453, 92 N. W. 819; *Aetna Indemnity Co. v. Schroeder*, 12 N. D. 110, 95 N. W. 436; *Meehan v. G. N. Ry. Co.*, 13 N. D. 432, 101 N. W. 183.

The order denying a motion for a new trial is reversed, and the cause remanded for further proceedings. All concur.

(111 N. W. 614.)

CHARLES A. WOODWARD V. NORTHERN PACIFIC RAILWAY CO.

Opinion filed February 20, 1907. Rehearing denied April 26, 1907.

Action — Assignment of Cause of Action — Pleading — Evidence.

1. The complaint charged defendant with negligence in causing a fire to be started, which spread, causing injury to certain premises claimed to be owned by plaintiff. At the trial plaintiff sought to show an assignment by one M. to him of a cause of action against defendant of a similar nature. *Held*, that such proof was properly rejected, as it in no way tended to support the allegations of the complaint.

Amendment — Pleading New Cause of Action.

2. Plaintiff at the trial asked leave to amend his complaint by setting up a cause of action accruing to M., and alleging an assignment thereof to him prior to the commencement of the action. This amendment would entirely change the cause of action, and hence was properly refused. Such proposed amendment was also inconsistent with the proof already introduced by plaintiff, which showed that such assignment was not made until after the action was commenced, and should for that reason have been denied.

Failure of Proof — Nonsuit.

3. Plaintiff was properly nonsuited for failure to prove the allegations of the complaint; it appearing that one M., and not plaintiff, was the owner of the property alleged to have been damaged by the fire in question.

Appeal from District Court, Morton County; *Winchester, J.*

Action by Charles A. Woodward against the Northern Pacific Railway Company. Judgment for defendant and plaintiff appeals.

Affirmed.

W. H. Stutsman, for appellant.

Allegation of ownership in fee simple is a good statement of fact. Bliss Code Pl. 210; Maxw. Code Pl., p. 139; *Ensign v. Sherman*, 14 How. Pr. 439; *Rough v. Simmons*, 3 Pac. 804; *Gage v. Kaufman*, 10 Sup. Ct. Rep. 406; *Donovan v. St. Anthony Elevator Co.*, 7 N. D. 513, 75 N. W. 809.

An action should not be dismissed for irregularity of practice which could be remedied by amendment without prejudice. *Morg-ridge v. Stoeffer*, 14 N. D. 430, 104 N. W. 1112.

Ball, Watson & Young, for respondent.

Purchaser of land on contract is the equitable owner and must bear all losses, whether at law or in equity. 29 Am. & Eng. Enc. of Law. 713.

Where one cause of action requires the allegation of an assignment thereof, and another does not, an amendment substituting one for the other is not generally allowed. *Barron v. Walker*, 7 S. E. 272; *Rapier v. Gulf, etc., Co.*, 69 Ala. 476; *Hart v. Henderson*, 66 Ga. 568; *Norris v. Pollard*, 75 Ga. 358; *McIlhenny v. Binz*, 13 S. W. 655.

A pleading must proceed to the end upon the theory upon which it is constructed. 21 Enc. Pl. & Pr., 6449; Toledo S. L. & K. C. R. R. v. Levy, 26 N. E. 773; Mescall v. Tully, 91 Ind. 99.

Plaintiff, not being the owner of the alleged cause of action, when suit was begun, was properly non-suited. 16 Enc. Pl. & Pr. 873; Hovey v. Sebring, 24 Mich. 232; McDowell v. Morgan, 33 Mo. 555; Hollingsworth v. Flint, 101 U. S. 591, 25 L. Ed. 1028; Dean v. Metropolitan Elevated R. Co., 119 N. Y. 540, 23 N. E. 1054.

FISK, J. This action was commenced in June, 1905, in the district court of Morton county to recover damages alleged to have been sustained by plaintiff through defendant's alleged negligence in causing a prairie fire on May 7, 1903, which spread to certain premises alleged to belong to plaintiff. From a judgment dismissing the action with costs to defendant, plaintiff appealed.

The record discloses that in September preceding the fire plaintiff entered into a contract with one McCollum, under which the real property alleged to have been damaged by the fire was sold to him; plaintiff agreeing thereby to convey title to the said McCollum upon final payment of the purchase price. In March, 1905, plaintiff secured a judgment in the district court of Morton county against the said McCollum for specific performance of this contract, and this judgment was recently affirmed by this court. See Woodward v. McCollum (decided at this term) 111 N. W. 623. After the commencement of this action, and in July, 1905, plaintiff procured from McCollum a written assignment of his claim against defendant railway company for the alleged damages to this land caused by the fire in question. At the trial plaintiff sought to introduce this assignment in evidence, but the court sustained defendant's objection thereto, and this ruling constitutes appellant's first assignment of error. This ruling was clearly correct. The proof offered tended in no manner to prove the allegations of the complaint. The complaint was not framed upon the theory that plaintiff was the assignee of a cause of action which had accrued to McCollum. If plaintiff wished to recover upon a cause of action which had accrued to McCollum and which had been assigned to him, he should have pleaded such facts in his complaint.

Appellant's second assignment of error is equally untenable. After the court made the ruling above mentioned, appellant asked leave to amend his complaint by substituting in lieu of lines 2, 3, 4 and 5, on the first page thereof, the following: "That he is now, and for

the space of three years last past has been, the owner in fee of the following described real estate, situate in the county of Morton and state of North Dakota, to wit: Section 33 in township 140 N., of range 84 W., of the fifth principal meridian; that he is the owner of the cause of action hereinafter set out by reason of such ownership, and also for the following reasons, to wit: That some time during the year 1902, and about the 9th day of September of said year, he contracted to sell said land to one Emmett S. McCollum, and on the 24th day of March, 1905, he secured a judgment against said McCollum in the district court of Morton county and state of North Dakota, requiring said McCollum to take said land and to pay for it, and that thereafter, and about the 1st day of June, 1905, by a stipulation of the attorneys in said last mentioned action, the said Emmett S. McCollum assigned to this said plaintiff all his right, title and interest to the cause of action above referred to, and an instrument duly executed by him in the words and figures following, to wit: 'Assignment. For value received, I hereby assign and set over to Charles A. Woodward, of Mandan, N. D., all my right and interest in and to that certain right of action against the Northern Pacific Railway Company for damages by reason of a prairie fire which was caused by the said railway company in the spring of 1903 and inflicted injury upon section 33, township 140 north, range 84 west, in Morton county, N. D., E. S. McCollum.' And plaintiff further says that as a part of said stipulation the said McCollum agreed to quitclaim to Charles A. Woodward all his right, title and interest in and to said described land to the said plaintiff." This proposed amendment was properly denied for two reasons: First, it attempts to set up a cause of action entirely distinct from that originally pleaded. A cause of action which accrued to McCollum and which has been assigned to plaintiff was entirely distinct from a cause of action originally accruing to plaintiff. In the former case an allegation of an assignment thereof to plaintiff prior to the commencement of the action would be essential. Such an amendment is not permissible. *Barron v. Walker*, 80 Ga. 121, 7 S. E. 272; *Rapier v. Gulf, etc., Co.*, 69 Ala. 476; *Hart v. Henderson*, 66 Ga. 568; *Norris v. Pollard*, 75 Ga. 358; *McIlhenny v. Binz*, 13 S. W. 655, 80 Tex. 1, 26 Am. St. Rep. 705. Second, the proposed amendment was inconsistent with the proof already introduced, which proof showed that the assignment was executed and delivered after June 15th, the date of the commencement of the action. The witness

Nuchols testified that this assignment was received from McCollum's attorney some time early in July, 1905, whereas the proposed amendment alleged the date about the 1st day of June of that year.

We think the third and last assignment of error is without merit. It is predicated upon the ruling of the trial court in granting defendant's motion made at the close of plaintiff's testimony to dismiss the action. The plaintiff had wholly failed to prove any cause of action. If any cause of action existed at the time this action was commenced, on account of the defendant's alleged negligence, such cause of action was in plaintiff's grantee, McCollum. See *Woodward v. McCollum*, *supra*. Such being the facts, plaintiff was properly nonsuited. 16 Enc. Pl. & Pr. 873; *Dean v. Railway Company*, 119 N. Y. 540, 23 N. E. 1054; *Hovey v. Sebring*, 24 Mich. 232, 9 Am. Rep. 122; *McDowell v. Morgan*, 33 Mo. 555; *Hollingsworth v. Flint*, 101 U. S. 591, 25 L. Ed. 1028.

The judgment of the district court is affirmed. All concur.

CHARLES A. WOODWARD V. EMMETT S. MCCOLLUM AND STATE
BANK OF NEW SALEM.

Opinion filed February 20, 1907.

Vendor and Purchaser — Title Free from Reasonable Doubt.

1. In an action to compel specific performance of a contract for the purchase of real property, the vendee defended upon the ground among others, that the vendor could not transfer to him a title free from reasonable doubt in conformity to Rev. Codes 1899, section 5032. *Held*, that such defense was not established.

Same — Signature by Initials.

2. In one of the deeds in plaintiff's chain of title the grantor signed his Christian name merely by the initials, but the body of the deed set forth his full Christian name, as well as surname. This was sufficient.

Deeds — Description of Parties.

3. One deed in the chain of title described the grantees as "Chauncey C., Frank E., and Henry S. Woodworth." This was sufficient to vest a two-thirds interest in Chauncey C. Woodworth and Frank E. Woodworth.

Same — Identity of Grantor.

4. A deed from Henry S. Woodworth was signed "Harry" S. Woodworth, although in the body of the instrument the correct name was given. *Held* sufficient; the identity of the person being apparent.

Specific Performance — Defective Title.

5. The vendee was bound to point out the defects complained of in the vendor's title, and by pointing out specific defects he waived those, if any, not mentioned by him.

Mortgage — Merger.

6. A mortgage appearing of record against the property is *held*, for reasons stated in the opinion, not to be a cloud upon plaintiff's title.

Specific Performance — Delay of Vendor — Time Essence of Contract.

7. Plaintiff's delay in furnishing title to defendant was not under the circumstances detailed in the opinion sufficient to relieve defendant of his contract duty to accept and pay for the property. Time was not made the essence of the contract, and, further, such delay was waived by defendant.

Vendor and Purchaser — Destruction of Property on Land Sold on Contract.

8. A barn on the premises was destroyed by fire after the contract for deed was executed without the fault of either party, and it is *held* that this fact does not prevent specific performance of the contract as the loss must be borne by the vendee; he being the beneficial owner in equity of the property.

Appeal from District Court, Morton County; *Winchester, J.*

Action by Charles A. Woodward against Emmett S. McCollum. Judgment for plaintiff. Defendant appeals.

Affirmed.

S. N. Nuchols (Thad L. Fuller, of counsel), for appellant.

Vendor must be ready and able to give a marketable title. Sec. 5032 Rev. Codes 1899; *Swayne v. Lyon*, 67 Pa. St. 436; *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195. Identity of person appearing under different names must be shown by extraneous proof. *Vickery v. Burton*, 69 N. W. 193, 6 N. D. 245. Transfer of mortgage by quitclaim is ineffective unless the mortgage debt is transferred also. 15 Am. & Eng. Enc. Law 849; *Peters v. Jamestown Bridge Co.*, 5 Cal. 335; *Cooper v. Newland*, 17 Abb. Pr. 342; *Bowers v. Johnson*, 49 N. Y. 432; *Pratt v. Scofield*, 45 Me. 386; *Pease v. Warren*, 29 Mich. 9.

W. H. Stutsman, for respondent.

A curable defect not assigned as a reason for refusing a deed, cannot prevent a decree of specific performance. *Wold v. Newgard*, 94 N. W. 859.

A quitclaim deed by a mortgagee discharges the mortgage. *Miles v. Ransford*, 7 Cow. 20; *Thayer v. McGee*, 20 Mich. 195; *Mason v. Beach*, 13 N. W. 884; *Conner v. Whitmore*, 52 Me. 185; *Lamprey v. Nudd*, 29 N. H. 299; *Cook v. Cooper*, 18 Ore. 145; *Rodriguez v. Hayes*, 76 Texas 225; 1 Hill. Mortg. p. 550; *Thorn-dike v. Norris*, 24 N. H. 460.

FISK, J. This appeal is from a judgment rendered by the district court of Morton county awarding specific performance of a certain contract for the sale of real property. The judgment was in favor of the plaintiff, Charles A. Woodward, and the defendant, Emmett S. McCollum, appealed and asks a trial de novo of the entire case in this court.

The complaint alleges ownership of the property in question in plaintiff prior to and at the date of the contract for deed, September 9, 1902, which property consisted of 610 acres, being section 33, township 140, range 84, in Morton county, upon which were situated certain buildings, including a large barn. It also alleges that under the terms of the contract defendant, McCollum, agreed to purchase said property and pay therefor the sum of \$10 per acre, \$1,000 to be paid at the date of contract, and the balance on or before November 15th thereafter. The vendor agreed on the final payment of the purchase price to convey such land to defendant free from any incumbrance by a good and sufficient warranty deed, and he also agreed to furnish the defendant an abstract of title showing the same to be free from incumbrance. The contract was executed on the part of plaintiff as party of the first part by one John Bloodgood, who is referred to in the contract as "John Bloodgood, agent," and the same is signed in the same manner, without disclosing his principal, and also by defendant. However, this fact is not deemed material as plaintiff afterwards fully ratified such contract, and defendant does not question the validity thereof. It is alleged that defendant went into possession of the land under such contract, but subsequently abandoned the same and repudiated all ownership therein. Then follow allegations as to plaintiff's tender to defendant on November 15th and at divers subsequent dates of a good and sufficient warranty deed conveying the land to him, together with

abstracts of title showing such land to be free from incumbrance, and that he has at all times since been able, ready and willing to perform his part of such contract, and a refusal on defendant's part to accept such deed or in any manner to perform such contract by paying the balance of such purchase price, and paying for a foreclosure of plaintiff's lien as vendor for the balance due, with interest. Defendant answered, denying that he went into possession of the land under said contract; also denying that plaintiff ever tendered a good and sufficient conveyance in accordance with the contract and that such land is free from incumbrance; and also denying that plaintiff tendered an abstract showing the title to be free from incumbrance. He alleges that between April 10, 1903, and July 1, 1903, the barn on said premises was destroyed by fire without his fault, and that same at the date of the contract was worth \$1,200. Certain other matters are alleged in the answer which it is unnecessary to mention here. The parties do not disagree in any material respect as to the evidential facts, but they do disagree as to the ultimate facts deducible therefrom. Appellant does not deny the execution of the contract as alleged, but he insists that plaintiff has failed to show that he has a perfect title to the property so as to enable him to transfer to appellant such title free from reasonable doubt, and he invokes the statutory rule embodied in Rev. Code 1899, section 5032, that "an agreement for the sale of property cannot be specifically enforced in favor of the seller, who cannot give the buyer a title free from reasonable doubt." This provision of our Code is a declaration of the common law rule "that the vendor must be ready and able to convey a marketable title." *Swayne v. Lyon*, 67 Pa. 436. In *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. Rep. 634, the rule is stated thus: "A purchaser is not compelled to take property the possession of which he may be compelled to defend by litigation. He should have a title that will enable him to hold his land in peace, and, if he wishes to sell it, be reasonably sure that no flaw or doubt will arise to disturb its market value." See, also, *Easton v. Lockhart*, 10 N. D. 181, 86 N. W. 697, and cases cited.

Appellant contends that plaintiff has failed to bring himself within this rule and hence cannot recover. What are the facts? Appellant concedes in his printed brief that on November 17, 1887, one Chauncey B. Woodworth had good title to all the land; that on April 13, 1888, he conveyed by warranty deed an undivided one-fourth

interest in said land to one Samuel H. Woodworth, who gave a mortgage back on such interest to secure the payment of \$3,000. Subsequently S. H. Woodworth executed to Chauncey B. Woodworth a deed purporting to convey to him a one-fourth interest therein. Thereafter Chauncey B. Woodworth, mentioned as party to the first part, purported to convey by deed the whole of such land to "Chauncey C.," "Frank E.," and "Henry S. Woodworth," which deed is signed "C. B. Woodworth." Next is a deed executed by Frank E. Woodworth and "Harry" S. Woodworth, purporting to convey an undivided two-thirds interest in said land to Charles A. Woodward, the plaintiff. And, lastly, it having been proved that Chauncey C. Woodworth had died testate, it is conceded that deeds were executed to plaintiff by Sarah E. Woodworth as sole beneficiary under the last will and testament of Chauncey C. Woodworth, deceased, also a deed from her as executrix of such last will and testament; also a deed from one L. N. Cary, as administrator with the will annexed of said decedent. Appellant's objection to plaintiff's title appears to be based upon the fact that some of the deeds were signed merely by the initials of the grantor, instead of by his full Christian name. We think such objection without merit. It appears that in each case where the grantor signed simply by his initials instead of his full Christian name the body of the deed gives the full Christian name and surname; and not only this, but the attestation clause recites that the grantor described signs it, and the notary before whom it was acknowledged certifies that the persons signing are the grantors named in the deed. *Rupert v. Penner*, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824, and *Middleton v. Findla*, 25 Cal. 76, are authorities directly in point, holding adversely to appellant's contention. See, also, numerous cases cited in the opinions in these cases holding to the same effect. The case of *Vickery v. Burton*, 6 N. D. 245, 69 N. W. 193, cited by appellant, is not in point. In that case it was held that there was no presumption of law that Pulaski J. Scovil and P. J. Scovil were one and the same person. That case differs from this, however, for the reason that in that case there was no evidence of the identity of the persons, while in the case at bar the certificate of the notary attached to the instrument supplied such proof.

It is next urged that one deed in the chain of title runs to Chauncey C., Frank E., and Henry Woodworth, without giving the surnames of the first two grantees; and it is contended that such description is insufficient to transfer any title to Chauncey

C. Woodworth and Frank E. Woodworth, through whom a portion of plaintiff's title is derived. The objection is clearly frivolous. The first two Christian names unmistakably describe two persons who have the same surname as the third person mentioned. Language used in a deed of conveyance of real property, as well as other contracts, should be given a common-sense interpretation, to the end that the evident meaning and intention of the parties may be given effect.

The deed from Frank E. and Henry S. Woodworth to plaintiff was signed by Henry as "Harry," and appellant insists that such instrument was insufficient to convey Henry's title to plaintiff. We must overrule this contention. Harry is a corruption of the name "Henry," in universal use; not only this, but all the circumstances show that the same person was intended. The contract for deed from Henry to plaintiff recites party of the first part as "Henry," although the signature is "Harry" and the certificate of the notary shows the identity of the person; not only this, but the other owners join in the same instrument. Taking these circumstances into consideration, we have no hesitancy in holding that the instrument thus signed was sufficient to transfer Henry's interest.

Furthermore, and to our mind a conclusive answer to this point, such objection was not urged until after this action was brought, although the abstracts of title were critically examined by defendant and certain other alleged defects in plaintiff's title pointed out. This is true in regard to the other alleged defects, and for this reason alone appellant cannot now be heard to urge them as a reason for refusing to comply with this contract, as all of such defects could have easily been cured by respondent if appellant had based his objections thereon. *Wold v. Newgard* (Iowa) 94 N. W. 859. It was respondent's duty to point out the defects relied upon.

One other objection urged by appellant to the sufficiency of plaintiff's title remains to be noticed. The mortgage executed by Samuel H. Woodworth to Chauncey B. Woodworth on April 13, 1888, was never satisfied upon the records, and it is contended that the same constitutes a cloud upon the title. At the time this mortgage was given the mortgagee conveyed to the mortgagor a one-fourth interest in the land. Subsequently, and on November 9, 1903, the mortgagor reconveyed such interest to the mortgagee, presumably in satisfaction of the mortgage, and the deed of conveyance contained a stipulation that the mortgage should not merge in the

title thereby acquired by such grantee, "but should remain in force as a valid mortgage thereon for the purpose of protecting and perfecting the title of second party to said premises." The evident object of the stipulation was to protect Chauncey B. Woodworth, the grantee, as against any subsequent liens created by Samuel H. Woodworth upon the property, and any judgments which may have been recovered against Samuel H. Woodworth while the title was in him, but no such precaution was necessary, as the abstract of title discloses that no such liens existed. The mortgage did not merge in the fee title so long as it was to the advantage of Chauncey B. Woodworth that it should not; but, when he conveyed to third parties his entire interest in the land without mentioning the mortgage, we think the same at once became merged in the fee title, and the grantees acquired the title free from the lien of the mortgage. Such we understand to be the well-settled rule. *Webb v. Meloy*, 32 Wis. 319, 20 Am. & Eng. Enc. of L. 1067, and cases cited. But even if there was no merger prior to such conveyance by Chauncey B. Woodworth, we are of the opinion that such conveyance by him would operate to transfer not only his fee title, but his rights as mortgagee, and his grantees could treat such mortgage as assigned or as released and satisfied, as should be to their advantage.

Thayer v. McGee, 20 Mich. 195; *Mason v. Beach*, 13 N. W. 884, 55 Wis. 607; *Conner v. Whitmore*, 52 Me. 185; *Lamprey v. Nudd*, 29 N. H. 299; *Cook v. Cooper*, 18 Or. 145, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709; *Rodriguez v. Hayes*, 76 Tex. 225, 13 S. W. 296.

The suggestion by appellant's counsel that, for aught that appears, the note or notes secured by this mortgage may now be in the hands of innocent third parties, is without merit. The mortgage shows upon its face that it was not given to secure notes at all, but was given to secure the performance of a certain contract. This being true, it follows that there can be no innocent third parties whose rights can be involved. We are of the opinion, therefore, that the mortgage in question constituted no cloud upon the title to this land, and could not be urged as a reason for appellant's refusal to accept the deed tendered by respondent.

Appellant also insists that plaintiff lost his right to compel specific performance of the contract in question on account of his delay in performing the terms of the contract on his part. While it is true that by the terms of the contract plaintiff was to furnish title upon

appellant's making final payment of the purchase price, which was to be made on or before November 15, 1902, and while appellant was ready and willing to pay such purchase price shortly after November 15th, and was prevented in completing the deal at that time on account of respondent's delay in perfecting the title to appellant's satisfaction, still we are of the opinion that respondent's delay under the circumstances cannot operate to defeat his right to specific performance. Time was not made the essence of the contract, and, furthermore, we think appellant waived the delay by demanding that the title be perfected through the probate proceedings. True, appellant may have had the right to rescind the contract because of the delay, but we think he waived such right by demanding as late as February 14, 1903, that the record title be perfected through probate proceedings. By such demand he necessarily impliedly consented to such extension of time for performance as was reasonably necessary to institute and complete the probate proceedings, and it does not appear that more time than this was consumed. We therefore must overrule this contention.

One other question remains to be considered. In the month of May, after the contract had been entered into, a valuable barn on the premises was destroyed by fire without the negligence of either party, and we are asked to decide which party must bear the loss, and, if plaintiff should bear such loss, then what effect, if any, should this have upon plaintiff's right to compel specific performance of the contract. A decision of this question necessarily involves the question as to the ownership of the property at the time of the fire; for upon the plainest principles of justice the loss should fall upon such owner. Formerly it was held that such loss should be borne by the vendor, but the modern authorities seem to be unanimous in holding it as above stated, although there is some conflict as to who should be considered the owner under such a contract. 29 Am. & Eng. Enc. of Law, 713, and cases cited.

While there is a diversity of judicial opinion as to the relations existing between the parties to such a contract, the great weight of authority is to the effect that upon the execution of the contract the purchaser becomes the beneficial owner in equity and the vendor retains the legal title in trust for such vendee. Am. & Eng. Enc. of Law (2nd Ed.) 703, and cases cited; *Clapp v. Tower et al.*, 11 N. D. 557, 93 N. W. 862; *Nearing v. Coop*, 6 N. D. 349, 70 N. W. 1044; *Roby v. Bank*, 4 N. D. 156, 59 N. W. 719, 50 Am. St. Rep. 633;

Moen v. Lillestal, 5 N. D. 331, 65 N. W. 694; Pom. Eq. Jur. section 368, and cases cited; Warvelle on Vendors (2nd Ed.) 842; Lombard v. Chicago Sinai Congregation, 64 Ill. 477. "The great weight of authority is to the effect that since the purchaser is, in equity, the owner, he must bear all losses, whether at law or in equity." Am. & Eng. Enc. Law, p. 713, and cases cited.

This is not a harsh or unjust rule, for the purchaser is at liberty to protect himself against loss, as he has an insurable interest in the property and he must be held to assume those risks which are ordinarily incident to such ownership. If, from any reason the property enhances in value during this time, he reaps the benefit, and hence it is no injustice to require him to bear any loss or deterioration, not the fault of the vendor.

We therefore have reached the conclusion that the plaintiff is entitled to the relief granted by the district court, and the judgment of that court is accordingly affirmed. All concur.

(111 N. W. 623.)

M. F. KEPNER v. A. J. FORD.

Opinion filed February 20, 1907.

Broker's Action for Commission — Evidence.

1. Plaintiff sued to recover a commission earned under a contract with defendant in finding purchasers for plaintiff's land. The contract was offered in evidence by plaintiff, and defendant objected to its reception upon the grounds that it is not a contract between the parties, plaintiff not having signed it; and that it is too indefinite and uncertain, and should be first reformed. *Held*, that the trial court properly overruled this objection.

Same.

2. Exhibit C, being a contract entered into by plaintiff and the persons whom he had procured to purchase the property, setting forth the terms of the purchase, was properly admitted in evidence.

Appeal — Error Without Prejudice.

3. The ruling of the trial court in permitting plaintiff to introduce secondary evidence as to the contents of Exhibit C, being a contract between plaintiff as agent and the purchasers, was error without prejudice.

Same — Objection Not Made Below.

4. Upon cross-examination of plaintiff, it was disclosed that one Chamberlain is to receive 25 per cent of any sum plaintiff may re-

cover in this action, and defendant contends that this should defeat plaintiff's recovery. The answer to this contention is the fact that no such defense was pleaded in the answer, and furthermore no ruling was made; nor was the trial court asked to make any ruling upon which such assignment of error could be predicated.

Brokers — Homestead — Wife's Signature to Listing Contract.

5. The fact that a portion of the land embraced in the contract consisted of the homestead of defendant and his wife, and that the latter did not join in the execution of the contract, does not render such contract invalid, as it was not a contract for the sale of the property, but a mere agreement on defendant's part to compensate plaintiff for finding a purchaser.

Appeal from District Court, Foster county; *Burke, J.*

Action by M. F. Kepner against A. J. Ford. Judgment for plaintiff and defendant appeals.

Affirmed.

R. P. Allison and F. Baldwin, for appellant.

The agreement was an entirety and the whole land or none must be taken. *Calmer v. Calmer et al.*, 106 N. W. 684; *Wegner v. Lubenow*, 95 N. W. 442.

Husband and wife must sign conveyance. *Helgeby v. Dammen*, 13 N. D. 167, 100 N. W. 245; *Teske v. Dittberner*, 98 N. W. 57; *Keeline v. Clark et al.*, 106 N. W. 257.

Executory contract for sale of homestead not signed by wife is void and no basis for specific performance and damages for breach. *Clark v. Koenig*, 54 N. W. 842; *Meek v. Lange*, 91 N. W. 695; *Teske v. Dittberner*, 98 N. W. 57.

Maddux & Rinker, for respondents.

Broker's contract with purchaser is admissible to show terms of sale. *MacLaughlin v. Wheeler*, 47 N. W. 816; *Lawson, et al.*, v. *Thompson*, 37 Pac. 732.

Failure of wife to join in contract with broker to sell homestead no defense to claim for commission. *Hamline et al. v. Schulte*, 27 N. W. 301; *Love v. Miller*, 53 Ind. 294; *Vinton v. Baldwin*, 88 Ind. 104; *Hurd v. Neilson*, 69 N. W. 867; *Felts v. Butcher*, 61 N. W. 991.

Real estate broker not responsible for his principal's title. *Kyle v. Rippey*, 20 Or. 447; *Christianson v. Wooley*, 41 Mo. App. 53; *Barber v. Hildebrand*, 42 Neb. 400.

Defective title will not defeat broker's claim for commissions. *Roberts v. Kimmons*, 65 Miss. 332; *Middleton v. Findla*, 25 Cal. 76; *Hamline v. Schulte*, 34 Minn. 534, 27 N. W. 301; See 43 L. R. A. 593; *Glentworth v. Luther*, 21 Barb. 145; *Canker v. Apple*, 15 Col. 141; *Jarvis v. Schrefer*, 105 N. Y. 289; *Barthell v. Peter*, 88 Wis. 316.

Contract with broker to sell in specified time cannot be revoked so as to defeat his commission. *Canfield v. Orange*, 13 N. D. 622, 102 N. W. 313; *Glover v. Henderson*, 120 Mo. 367; *Ehrlick v. Insurance Co.*, 88 Mo. 249; *Kirk v. Hartman*, 63 Pa. 97; *Durkee v. Gunn*, 41 Kan. 496; *Vincent v. Woodland Oil Co.*, 165 Pa. 402; *Stringfellow v. Powers*, 4 Tex. App. 199.

FISK, J. This action was commenced in the district court of Foster county to recover the sum of \$2,000 and interest, being the agreed compensation which plaintiff was to receive under a written contract with defendant for finding a purchaser for certain real property owned by defendant. The contract was not artistically drawn, but clearly discloses the intention of the parties as follows: The property to be sold was described as the E $\frac{1}{2}$, section 5, and S $\frac{1}{2}$, section 4, township 148, range 67, Eddy county. Terms of sale were to be \$10,000 net to defendant, one-half of it, or more, in cash, the balance to suit buyer at 7 per cent interest; plaintiff to have all he could get above that price. The contract, by its terms, was made irrevocable for a period of six months from its date, which was March 3, 1904. The action was tried before a jury, and a verdict returned for plaintiff for the amount sued for. A motion for a new trial was made and denied, and judgment rendered in plaintiff's favor, from which defendant appeals to this court.

A statement of the case was duly settled in the district court, containing a specification of the errors complained of. The making of the contract and his ownership of the land was admitted by defendant, and it was conceded that plaintiff in August, 1904, found purchasers for the property who were ready, able, and willing to purchase the same for \$12,000 cash; and the sole question of fact in dispute was as to whether or not the contract was revoked by mutual consent of the parties shortly after its date. By consent of counsel the jury was asked to make a special finding upon this question, and they found in plaintiff's favor, which finding is not challenged by appellant.

Appellant alleges numerous errors upon which he relies for a reversal, and which we will dispose of in the order mentioned in his brief.

First. It is asserted that the court erred in overruling defendant's objection to the reception in evidence of plaintiff's exhibit A, being the contract above mentioned, upon which plaintiff bases his cause of action. The objection was as follows: "That it is not a contract between the parties, that it does not bind plaintiff to anything, that the paper is indefinite and uncertain, and without parol proof it would be inoperative. It being only signed by defendant, it in no place provides that if the place be sold for \$10,000 or upwards it should not all go to defendant." This objection was clearly frivolous. While, as we above stated, the contract was poorly worded, still the intention of the parties is clear, and such intention must be given effect. The instrument was evidently a printed blank in use by plaintiff for listing property with him for sale, and it appears to be divided into several parts or subdivisions. The first portion of it was evidently intended to be merely a memorandum of the terms, the blanks in which were to be filled in by plaintiff. It is as follows: "Original 600 acres. M. F. Kepner, Real Estate, New Rockford, North Dakota. Land agent's description and contract: E½ sec. 5 & S½ sec. (4 Sec. 5-4) Twp. 148, Range 67, Eddy county, price of tract per acre or as a whole, and terms of sale \$10,000 net, one-half or more cash, balance to suit buyer at 7 per cent interest. This contract is \$10,000 net to him, and I to have all I can get above that price." Following the above is a subdivision under the head "Title and Description," in which numerous questions and answers pertaining to the title, location, etc., are set forth. Then follows a subdivision containing questions and answers under the headings "Description of Surface," and "Description of Improvements," after which follows a subdivision, headed "Contract," and this is signed by the defendant. It is apparent, from an inspection of the whole document, that the defendant authorized the plaintiff to find a purchaser for the whole property, and that he agreed that plaintiff should have for his remuneration all he could sell it for in excess of \$10,000. The first ground of the objection, which is in effect that the instrument is a unilateral contract, and is wholly without merit. Such a contract is clearly unobjectionable. It was not necessary that the parties should have reduced this contract to writing, as such a contract may rest in parol (*MacLaughlin v.*

Wheeler, 47 N. W. 816, 1 S. D. 497), and it is idle to talk about first reforming it before giving effect to the intention of the parties.

Appellant's second assignment of error is predicated upon the court's ruling in receiving in evidence plaintiff's Exhibit C, which is a mere memorandum agreement between the plaintiff, signing himself as agent for the defendant, and Maurice Deneen and W. H. Deneen, showing that the two last named persons agreed to purchase the defendant's said property at the sum of \$12,000 cash; the defendant to give warranty deed and furnish abstract showing no incumbrance. This is dated August 6, 1904. The ground of defendant's objection is that plaintiff had no authority to enter into such agreement, and hence that the same is not binding upon defendant. This objection is clearly untenable. Whether or not plaintiff could enter into a contract with the Deneens which would be binding upon the defendant is not material. Conceding that he could not, which no doubt is true (*Brandrup v. Britten*, 11 N. D. 376, 92 N. W. 453), still we think this exhibit was admissible as some evidence at least of the fact that the Deneens were willing to purchase the property, and also for the purpose of showing the terms upon which they were willing to purchase (*MacLaughlin v. Wheeler*, 47 N. W. 816, 1 S. D. 497; *Lawson et al. v. Thompson*, 37 Pac. 732, 10 Utah, 462). It was incumbent upon plaintiff to furnish proof of such facts. The Deneens afterwards testified to their willingness and ability to purchase the property upon the terms stated, and such fact was not disputed in any way by defendant, and hence such ruling, if error, was entirely harmless. There is nothing in the opinion in *Brandrup v. Britten*, 11 N. D. 376, 92 N. W. 453, relied upon by appellant, holding contrary to the views above expressed.

Appellant's third assignment of error relates to the reception in evidence of plaintiff's Exhibit B, and what we said as to appellant's first assignment of error applies to this.

The fourth error complained of consists in the overruling of the defendant's objection to the question asked the witness W. H. Deneen: "You may give the substance of this contract as near as you can." We think this objection was well taken, and should have been sustained; but such ruling was error without prejudice. As we said before, it was not denied by defendant that plaintiff had procured the Deneens to purchase this property, and that they were willing and able to do so, upon the terms above stated. Defendant's counsel, it will be remembered, requested the court to submit to the

jury the single question as to whether the contract, Exhibit A, had been revoked, expressly stating this to be the only fact in dispute.

The fifth assignment of error has already been disposed of by what we said in reference to the first assignment.

The next assignment of error is evidently based upon certain evidence brought out upon cross-examination of plaintiff, to the effect that one Chamberlain is to have 25 per cent of the recovery in this action. A complete answer to this is that no such defense is pleaded in the answer, and furthermore no ruling was made, nor was the trial court requested to make any ruling upon which such assignment of error could be predicated.

The last error assigned, and the one principally relied upon by appellant's counsel, is that the land described in Exhibit A, or a portion thereof, was the homestead of the defendant and his wife, and, the latter not having signed such contract, the same is void, and hence no damages for its breach can be recovered. We are obliged to overrule appellant's contention in this respect. The contract was not for the sale of the property, as counsel seems to think, but it was a mere brokerage contract, whereby plaintiff was to receive all over a certain sum in case he found a purchaser for the property. As we have above decided, such a contract was not even required to be in writing. Was such a contract void or voidable because the wife was not a party thereto? Clearly not. It was not a contract whereby the defendant agreed to sell or convey the property, and hence it is not vulnerable to the objection that it is in contravention of section 5407, Rev. Codes 1905. *MacLaughlin v. Wheeler*, 1 S. D. 497, 47 N. W. 816; *Brandrup v. Britten*, 11 N. D. 376, 92 N. W. 453. Nor does it contravene the provisions of section 5052, which provides that the homestead of a married person cannot be conveyed unless the wife joins in such conveyance. It is no defense in this action to say that defendant's wife would not permit him to make the sale. Plaintiff having found a purchaser, ready, able, and willing to purchase on the terms stipulated, it was defendant's duty, in so far as plaintiff's right to commission is concerned, to make the sale by furnishing a merchantable title. *Hamlin v. Schulte*, 27 N. W. 301, 34 Minn. 534, and cases cited; *Kock v. Emmerling*, 22 How. (U. S.) 69, 16 L. Ed. 292; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192; *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447; *Kyle v. Rippey*, 20 Or. 447, 26 Pac. 308; *Christensen v. Wooley*, 41 Mo. App. 53; *Barber v. Hildebrand*, 42 Neb. 400, 60 N. W. 594; *Roberts*

v. Kimmons, 65 Miss. 332, 3 South, 736; Middleton v. Findla, 25 Cal. 76; Jarvis v. Schaefer, 105 N. Y. 289, 11 N. E. 634; Barthell v. Peter, 88 Wis. 316, 60 N. W. 429, 43 Am. St. Rep. 906. A very exhaustive note upon this question may be found in 43 L. R. A. 593, where many authorities are cited.

Finding no error in the record prejudicial to defendant, it follows that the judgment appealed from should be, and the same is hereby, affirmed. All concur.

111 N. W. 619.

PETER P. ZINK v. JAMES W. LAHART.

Opinion filed February 20, 1907.

Trial — Conflict in Testimony — Directing Verdict.

1. When there is a substantial conflict in the testimony, it is reversible error to direct a verdict. Such action by the court is a clear invasion of the province of the jury, as the jury, and not the court, must determine the credibility of the witnesses.

Same — Admonitions to Witness.

2. Certain admonitions by the trial judge to the defendant, while on the witness stand, but not in the presence or hearing of the jury, were not prejudicial to the rights of defendant.

Appeal from District Court, Foster County; *Burke, J.*

Action by Peter P. Zink against James W. Lahart. Judgment for plaintiff. Defendant appeals.

Reversed and new trial ordered.

C. J. Maddux, T. F. McCue and S. L. Glaspell, for appellant.

Where there is conflict of testimony case must go to jury. 1 Thompson on Trials, 1037; 30 Am. & Eng. Enc. of Law, 1063; Slattery v. Donnelly, 1 N. D. 264, 47 N. W. 375; McRea v. Hillsboro Nat'l Bank, 6 N. D. 353, 70 N. W. 813; Vickery v. Burton, 6 N. D. 245, 69 N. W. 193; Cameron v. G. N. Ry. Co., 8 N. D. 124, 77 N. W. 1016; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Heckman v. Evanson, 7 N. D. 173, 73 N. W. 427; Sioux City & Pac. R. R. Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745.

It is error for the court during the examination of a witness to impose upon the jury by words or conduct his own belief as to the

credibility of the witness. 30 Enc. of Law 1066; McMinn v. Wheelan, 27 Cal. 300; Barlow Bros. v. Parsons, 49 Atl. 205; State v. Lucas, 33 Pac. 538.

A trial court should not express its opinion as to the credibility of witnesses or the weight of their testimony, and the expression of such opinion is held to be material error for which the judgment may be reversed. 21 Enc. of Pl. and Pr. 997; Sharpe v. State, 10 S. W. 228; People v. Vindleberger, 34 Pac. 852; Hudson v. Hudson, 16 S. E. 349; Feinber v. People, 51 N. E. 798; People v. Hare, 57 Mich. 505, 24 N. W. 843; Cronkhite v. Dickinson, 16 N. W. 371; State v. Allen, 69 N. W. 274.

F. Baldwin, for respondent.

It is the court's duty to direct a verdict, when it would be compelled to set aside one other than that so directed. 46 Cent. Dig. Sec. 392, Col. 1252.

The court should have been asked to submit the case, and have pointed out the testimony relied upon. 2 Cent. Dig. Col. 1770, Sec. 1395, etc.

FISK, J. This appeal is from a judgment of the district court of Foster county rendered in plaintiff's favor, pursuant to a verdict directed by the court. The action was brought to recover the purchase price of certain flax which plaintiff claims to have sold to defendant in the fall of 1902. Such sale was specifically denied by the answer, and this was the sole issue in the case. Testimony was introduced by plaintiff showing delivery of the flax to one Byfield at Melville, and tending to show that this man, Byfield, in the purchase thereof was merely acting as defendant's agent or servant. Certain admissions claimed to have been made by defendant to this effect were proved by plaintiff. Defendant flatly denied that Byfield was in his employ, or that he acted for him in the purchase of said grain, and he specifically denied that he had any interest with Byfield in the grain business at said place, other than the fact that he had loaned \$2,000 to Byfield to enable him to carry on such business. At this juncture in the trial the judge excused the jury from the court room, and administered to the defendant the following admonition: "The court admonishes the witness that this is a court of justice and no farce, and the court is not satisfied with the testimony given and warns him at this time that, if the testimony should at the close of the examination disclose that he has testified to that

which is not true, criminal prosecution will be started immediately." To this deliverance of the court counsel for defendant excepted and stated that no further testimony would be offered. Both parties having rested, the court, on plaintiff's motion, directed the jury to return a verdict for the plaintiff, and this is assigned as error.

It is clear that this action of the court was erroneous. There was a square conflict in the testimony as to whether Byfield was either defendant's agent or servant in the purchase of the flax, and it was not for the court to say, as a matter of law, that defendant perjured himself in giving his testimony as he did. This was a clear invasion of the province of the jury. If there is one question more firmly settled than any other, it is that in cases where there is a substantial conflict in the evidence the triors of the facts have the exclusive right to pass upon the credibility of the witness. The importance of exercising great caution in taking a case from the jury has frequently been emphasized by this court. *McRea v. Hillsboro Nat. Bank*, 6 N. D. 353, 70 N. W. 813; *Slattery v. Donnelly*, 1 N. D. 264, 47 N. W. 375; *Vickery v. Burton*, 6 N. D. 245; *Cameron v. G. N. Ry. Co.*, 8 N. D. 130, 77 N. W. 1016. The rule is well stated in *Thompson on Trials*, Vol. 1, sections 1037, 1038.

Appellant's only other assignment of error is based upon the action of the court in administering to defendant the admonition above mentioned. In view of the fact that a new trial must be ordered, it is deemed unnecessary to consider this assignment at any length. Suffice it to say that, while we do not think such action on the part of the trial court is to be commended, and while we believe the administration of justice would be subserved equally well if trial courts would refrain from such practices, still we are not prepared to say that the same was prejudicial error. The jury was excused from the court room, and we cannot presume, in the absence of an affirmative showing to that effect, that the jury would have acquired knowledge of or have been influenced in the least by such statement.

The judgment of the district court is reversed and a new trial ordered, with costs to appellant. All concur.

(110 N. W. 931.)

KERR v. SUNSTRUM.

Opinion filed February 20, 1907.

Appeal from District Court, McLean County; *Winchester, J.*

Action by O. W. Kerr against P. A. Sunstrum. Judgment for defendant, and plaintiff appeals.

Reversed.

M. C. Spicer and *Turner & Wright*, for appellant.

Geo. P. Gibson, for respondent.

PER CURIAM. Following the case of *Kerr v. Anderson* (decided at this term), 111 N. W. 614, 16 N. D. 36, the order denying the motion for a new trial is reversed, and the cause remanded for further proceedings.

(111 N. W. 614.)

KERR v. SWANSON.

Opinion filed February 20, 1907.

Appeal from District Court, McLean County; *Winchester, J.*

Action by O. W. Kerr against Frank Swanson. Judgment for defendant, and plaintiff appeals.

Reversed and remanded.

M. C. Spicer and *Turner & Wright*, for appellant.

Geo. P. Gibson, for respondent.

PER CURIAM. Following the case of *Kerr v. Anderson* (decided at this term), 111 N. W. 614, 16 N. D. 36, the order denying the motion for a new trial is reversed, and the cause remanded for further proceedings.

(111 N. W. 615.)

KERR v. HERRED.

Opinion filed February 23, 1907.

Appeal from District Court, McLean County; *Winchester, J.*

Action by O. W. Kerr against Nels O. Herred. Judgment for defendant and plaintiff appeals.

Reversed and remanded.

M. C. Spicer and *Turner & Wright*, for appellant.

Geo. P. Gibson, for respondent.

PER CURIAM. Following the case of *Kerr v. Anderson* (decided this term), 111 N. W. 614, 16 N. D. 36, the order denying the motion for a new trial is reversed, and the cause remanded for further proceedings.

(111 N. W. 615.)

VANNIE A. HALL v. NORTHERN PACIFIC RAILWAY CO.

Opinion filed March 12, 1907.

Negligence — Pleading — Plaintiff Must Recover, If at All, on Act Complained of.

1. A complaint in an action to recover damages for negligence must state the act of negligence complained of, and the plaintiff must recover, if at all, upon the particular act of negligence stated in the complaint.

Carriers — Question of Negligence Submitted to Jury.

2. Evidence examined, and *held* to be sufficient, under the rule heretofore established by this court, to require a submission to the jury of the question of defendant's negligence as alleged in the complaint.

Same.

3. It was properly a question for the jury to say under all the evidence whether or not plaintiff was guilty of negligence contributing to the injury complained of.

Appeal from District Court, Eddy County; *Burke, J.*

Action by Vannie A. Hall against the Northern Pacific Railway Company. Judgment for defendant, and plaintiff appeals.

Reversed.

S. L. Glaspell, for appellant.

Where the evidence is in doubt, or in conflict, or when different inferences may be drawn from undisputed evidence, the suit should be submitted to the jury. *Cameron v. Great Northern R. Co.*, 8 N. D. 124, 77 N. W. 1016; *Hove v. Chicago & N. W. Ry. Co.*, 62 Wis. 666; *Detroit & Milwaukee Ry. Co. v. Steinberg*, 17 Mich. 99;

Sioux City & Pac. Ry. Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745; Pirie v. Gillitt, 2 N. D. 255, 50 N. W. 710; Williams v. Northern Pacific Ry. Co., 3 N. D. 168, 14 N. W. 97; Slattery v. Donnelly, 1 N. D. 264, 47 N. W. 375; Falk Brewing Co. v. Millenz Bros., 5 Dak. 136; Finney v. Northern Pac. Ry. Co., 3 Dak. 270, 16 N. W. 500; Knight v. Towles, 62 N. W. 964; Matton v. Fremont, V. & M. V. R. Co., 60 N. W. 740; Bates v. Fremont V. & V. R. Co., 57 N. W. 72; Chicago City Ry. Co. v. Nelson, 74 N. E. 458; State v. Johnson, 103 N. W. 565.

A carrier must allow his passengers a reasonable time to get on and off. 2 Sherman & Redfield on Negligence (4th Ed.), Sec. 508; Chicago, B. & Q. Ry. Co. v. Landauer, 54 N. W. 976; Leggitt v. Western Ry. Co., 21 Atl. 96, 143 Pa. St. 43; Lloyd v. Hannibal R. Co., 53 Mo. 509; Kellar v. S. C. & St. P. R. Co., 6 N. W. 486; Kennon v. Vicksburg S. & P. R. Co., 26 So. 466; Nichols v. Dubuque & D. R. Co., 28 N. W. 44.

On motion for directed verdict the court is bound to construe the evidence most favorably to the plaintiff. Colgrove v. N. Y. & N. H. R. Co. and N. Y. & Harlem R. Co., 20 N. Y. 492; Ellis & Martin v. Ohio Life Ins. & Trust Co., 4 Ohio St. 645; Bullard v. Boston & M. R. R., 5 Atl. 838; Hoyer v. C. & N. Ry. Co., 62 Wis. 666; Falk v. N. Y. S. & W. R. Co., 29 Atl. 157.

Where there is a conflict of testimony the question whether the plaintiff is guilty of contributory negligence is for the jury. Filer v. N. Y. Cent. Ry. Co., 49 N. Y. 47; Washington & G. R. Co. v. Tobriner, 147 U. S. 557; Morgan v. Southern Pac. Co., 30 Pac. 601; Pittsburg Ry. Co. v. Kane, 6 Atl. 845; Bucher v. N. Y. C. R. Co., 98 N. Y. 128; Brooks v. Boston & M. Ry., 135 Mass. 21; Terre Haute & I. Ry. Co. v. Buck, 96 Ind. 346, 49 Am. Dec. 168; 6 Wait's Actions & Defenses, 584.

It is not contributory negligence to get on or off a moving train, but the same is a question for the jury. Eppendorf v. Brooklyn City Ry. Co., 69 N. Y. 195; Bartholomew v. N. Y. Cent. Ry. Co., 102 N. Y. 716; Chicago West Div. Co. v. Mills, 105 Ill. 63; Mulhado v. Brooklyn Ry. Co., 30 N. Y. 370; Lewis v. President, etc., Delaware & H. Canal Co., 40 N. E. 248; Staines v. Cent. Ry. Co., 61 Atl. 385; Bartholomew v. N. Y. Cent. Ry. Co., 7 N. E. 623; Cousins v. Lake Shore & M. S. Ry. Co., 56 N. W. 14; Raben v. Cent. Iowa Ry. Co., 34 N. W. 621; Shannon v. Boston & A. R. Co., 2 Atl. 678; Delaware & Hudson Canal Co. v. Webster, 6 Atl. 41;

Filer v. N. Y. Cent., 49 N. Y. 47; Carr v. Eel R. & V. Ry. Co., 33 Pac. 213; St. Louis & S. Ry. Co. v. Ratby, 87 S. W. 407; Chicago & A. R. Co. v. Byrum, 38 N. E. 578; St. Louis, I. M. & S. Ry. Co. v. Persons, 4 S. W. 755; Christensen v. Metropolitan St. Ry. Co., 137 Fed. 708; Scofield v. C., M. & St. P. Ry. Co., 114 U. S. 615, 29 L. Ed. 224.

Ball, Watson & McClay, for respondent.

Plaintiff must make out his case by proof of the negligence alleged. Flint, etc., Ry. Co. v. Stark, 38 Mich. 714; Manuel v. C., R. I. & P. R. Co., 10 N. W. 237; Carter v. Kansas City, etc., R. Co., 21 N. W. 607; Miller v. Chicago & N. W. R. Co., 23 N. W. 756; Pennington v. Detroit, G. H. & M. Ry. Co., 51 N. W. 634; Cowan v. Muskegon Ry. Co., 48 N. W. 166; Price v. Railroad, 72 Mo. 414; Waldhier v. Railroad, 71 Mo. 514; Ohio, etc., Ry. Co. v. Stratton, 78 Ill. 88; Illinois, etc., Co. v. Chambers, 71 Ill. 519; C., B. & Q. Ry. Co. v. Bell, 112 Ill. 360; Toledo, etc., Co. v. Foss, 88 Ill. 551; Chicago & A. R. R. Co. v. Rayburn, 38 N. E. 558; Santa Fe & P. & P. Ry. Co. v. Hurley, 36 Pac. 216.

The train being held long enough for all passengers to alight, it will be presumed that they had gotten off. Raben v. Cent. Iowa R. Co., 35 N. W. 645; Ill., etc., R. Co. v. Slatton, 54 Ill. 133; Straus v. R. Co., 80 Mo. 220.

If a passenger requires a longer time he must give notice. New Orleans, etc., Co. v. Statham, 97 Am. Dec. 478.

A railway company is not liable for injuries caused by others, when not acting in concert with them. Chicago, etc., Ry. Co. v. Scates, 90 Ill. 586; Sherman & Redfield on Negligence, Sec. 11, 5th Ed.

A carrier is not responsible for unforeseen circumstances. Transportation Co. v. Harper, 118 Ga. 672, 45 S. E. 458; Cleveland v. Steamboat Co., 86 N. Y. 306, 89 N. Y. 627, 125 N. Y. 299; Dumas v. Ry. Co., 43 S. W. 908; Furgason v. Citizens' St. Ry. Co., 44 N. E. 936.

A passenger leaves a train in motion at his own peril. Ohio, etc., Ry. Co. v. Stratton, 78 Ill. 88; Chicago, etc., Ry. Co. v. Randolph, 53 Ill. 510; Ill. Cent. Ry. Co. v. Chambers, 71 Ill. 519; Davis v. N. W. R. Co., 18 Wis. 175.

FISK, J. Plaintiff brought this action to recover damages for alleged negligence of defendant resulting in injuries to her while

in the act of alighting from one of defendant's passenger trains at Sheyenne in this state, in April, 1904. At the close of the evidence the trial court, on defendant's motion, directed a verdict in defendant's favor, and this appeal is from the judgment entertained pursuant thereto.

Appellant assigns as error the ruling of the court in directing such verdict. The evidence is incorporated in a statement of case duly settled, from which we are required to say, according to the well-settled rule in this court, "whether there is any competent evidence in the record reasonably tending to sustain the plaintiff's cause of action alleged in her complaint," and in determining this question we are to disregard all conflicts in the evidence and construe the same most favorably to the plaintiff, and, "if the evidence is such that intelligent men may fairly differ in their conclusions thereon upon any of the essential facts of the case," it is our duty to reverse the judgment and order a new trial. *Cameron v. G. N. Ry. Co.*, 8 N. D. 124, 77 N. W. 1016; *Vickery v. Burton*, 6 N. D. 253, 69 N. W. 193; *McRea v. Bank*, 6 N. D. 353, 70 N. W. 813; *Pirie et al. v. Gillitt et al.*, 2 N. D. 255, 50 N. W. 710; *Zink v. Lahart*, 16 N. D. 56, 110 N. W. 931. Plaintiff in her complaint, after alleging the fact that the defendant is a railroad company and engaged as a common carrier of passengers between Jamestown and Leeds, and alleging that she was a passenger on defendant's train on April 6, 1904, bound for Sheyenne, states her cause of action as follows: "That on said trip and on said date she conducted herself in due care and caution as a railroad passenger, but the defendant, by its negligence and by the negligence of its employes, the conductor and engineer of said train, committed gross negligence in the performance of their duties in carrying this plaintiff as a passenger, to wit: that said train stopped at the station of Sheyenne that date to permit this plaintiff and other passengers to alight from said train, the said station of Sheyenne being the point of their destination. This plaintiff alleges that upon the arrival at the station of Sheyenne aforesaid, the train was stopped opposite the station house, and adjacent to the platform between the station house and the railway track, and the announcement was made by the servants in charge of said train that the station, Sheyenne, was at hand; the train being at a standstill. At that point this plaintiff attempted to alight, using all due care in her movements. While stepping down the steps of the car platform to reach the station platform, the train was started. As the plain-

tiff was in the act of stepping off, the train was started by the servants of the defendant with great violence and shock, throwing the plaintiff violently at full length upon her side and body upon the platform, so as to cause her great pain and injury," to her damage, etc. The answer admits defendant's corporate capacity, and that plaintiff was a passenger upon its train as alleged, but denies the other matters alleged in the complaint, and it alleges that, if plaintiff was injured, she contributed to such injury by her own negligence in attempting to alight from the train while the same was in motion. It will be seen that the particular negligence relied upon by the plaintiff in her complaint is the act of the defendant through its servants in starting the train while plaintiff was in the act of stepping from the car to the depot platform. The allegation that the train was started "with great violence and shock" merely goes to the degree of defendant's culpable act. We are to determine, therefore, whether there is any evidence in the record reasonably tending to support this allegation; for it is well settled that plaintiff's right to recover must depend upon the fact as to whether or not she has established her cause of action as alleged. As counsel for defendant very properly asserts, she cannot recover upon a claim of negligence not pleaded. *Flint, etc., Ry. Co. v. Stark*, 38 Mich. 714; *Manuel v. Railway Co.*, 10 N. W. 237, 56 Iowa 655; *Carter v. Railway Co.*, 21 N. W. 607, 65 Iowa 287; *Miller v. Railway Co.*, 23 N. W. 756, 66 Iowa 364; *Pennington v. Railway Co.*, 51 N. W. 634, 90 Mich. 505; *Cowan v. Muskegon Ry. Co.*, 48 N. W. 166, 84 Mich. 583; *Price v. Railroad Co.*, 72 Mo. 414; *Ill Cent. Ry. Co. v. Slatton*, 54 Ill. 133, 5 Am. Rep. 109; *Ohio, etc., Ry. Co. v. Stratton*, 78 Ill. 88; *C. B. & Q. Ry. Co. v. Bell*, 112 Ill. 360; *Toledo, etc., Ry. Co. v. Foss*, 88 Ill. 551; *Chicago, etc., Ry. Co. v. Rayburn*, 38 N. E. 558, 153 Ill. 290.

Counsel for respondent earnestly contend, however, that there is no evidence from which a jury could find that defendant was guilty of the negligent act charged; and hence they insist that the action of the trial court in directing a verdict must be sustained. We think counsel are mistaken in their contention that plaintiff alleged one cause of action or ground of negligence, and sought to prove another. As before stated, the particular act of negligence complained of consists in starting the train while plaintiff was in the act of stepping therefrom, but counsel seem to think that plaintiff's proof at the trial, if it proved anything, merely tended to show that defend-

ant was negligent in not giving plaintiff sufficient time in which to make her egress from the car, and that she relies upon this ground for recovering rather than the ground pleaded. It is true that much of plaintiff's testimony had but a remote bearing upon the real issues involved, but we are of the opinion from a careful reading of the testimony, that there was sufficient evidence introduced bearing upon the issues raised by the pleadings to require a submission of the case to the jury. The plaintiff testified: "The train was not moving before I attempted to step off. It was not moving before I moved one of my feet to step on the platform. As near as I can tell and remember, it was at the moment when I had lifted a foot to step off, and the other foot was on the steps, that the train started. Q. Did the train move at all until after you fell? A. Yes, sir, the train starting is what threw me. It was the motion of the train that caused me to fall. Q. As I understand, then, at the present time you say that the cause of your accident was really because of the fact that you were hindered in passing out of the door by the passengers standing in the aisle? A. Partly that."

Henry Flaskrood, a witness for the plaintiff, testified: "Saw Miss Hall fall on the platform. When the train stopped, I was standing on the platform. Q. What did you see on the platform? A. Three ladies were standing in the doorway, and a gentleman standing on the foot of the steps, with one hand on each side of the coach. Q. What happened next? They were standing there talking, and Miss Hall couldn't get through and finally she kind of squeezed herself through, and got between the car and the ladies, and just at the time she was on the second step, and was going to get off, the car moved. I couldn't say if the engine bell rang. She fell about four feet away from the car. It looked as though she struck hard. It was not running very fast when she got off, but still it was moving. The train began to move as she was about on the second step of the platform. There are two or three steps to the platform, I think, and she was on the second step from the bottom. At that time I saw a man standing on the last step, with a hand on each rail. He either moved or dropped off to let her get by, or so she could get by. If he had held his hands there, she would have fallen against him. He either raised or dropped his hands. She then fell off the second step from the bottom and fell onto the platform."

Henry Kermott testified: "I was standing between the train and the depot when Miss Hall fell, a little to the north of the step from which she was descending. I saw her fall. I saw her standing at the car door, and next I saw her she was just kind of lunging; she fell. I think she was attempting to get off the car. She was at the door and there was a crowd on the platform—some men, girls or women. The next thing I saw she was falling, and I helped pick her up. She fell straight out as though she was pitched out. Her whole body on the platform. It was a severe fall. There was no brakeman or conductor at the steps that I saw. I should judge she fell from the second step of the car platform."

Plaintiff being recalled, testified: "It was the starting of the train that threw me. The train was not moving when I got down the steps to get off, and when it started it threw me."

There was evidence tending to show that no warning was given before starting the train, and we are unwilling to say that the jury might not have inferred from all the circumstances that defendant's servants in charge of the train should have known, if they had been exercising due care, that plaintiff was in the act of alighting from the car at the time the train was started.

While the testimony nowhere expressly shows that the train was started with "great violence and shock" as alleged, or in any manner other than the usual manner, still, we think, from the whole testimony, the jury as reasonable and intelligent men might have fairly drawn the conclusion therefrom on account of the way in which the accident occurred, and all the circumstances appearing from the evidence, that the train was started in a sudden and reckless manner, and without warning, in disregard of the duty which defendant owed looking to the safety of its passengers. The defendant was in duty bound to afford plaintiff a reasonable opportunity to alight from its train in safety, and if, as alleged in the complaint, it failed to do so—in other words, if by reason of the carelessness of its servants in suddenly starting its train without warning while plaintiff was in the act of stepping therefrom, she, without carelessness on her part, fell and was injured—defendant would be liable, provided its servants in charge of the train knew or ought to have known, in the exercise of due care, that plaintiff was thus in the act of alighting therefrom. As stated by Chief Justice Gilfillan in *Keller v. Railway Co.*, 27 Minn. 178, 6 N. W. 486: "It would certainly not be permissible for them to be so reckless of the lives and limbs of pas-

sengers as to start the train when they know, or with reasonable care might know, that passengers are in the act of alighting." See generally upon the duty which a common carrier owes to its passengers in this respect, Rev. Codes 1905, section 5629; *Luse v. Union Pac. Ry. Co.*, 46 Pac. 768, 57 Kan. 361; 3 Thompson on Law of Neg., sections 2682, 2802, 2860, and cases cited; *Falk v. N. Y. Cent., etc., Co.*, 29 Atl. 157, 56 N. J. Law, 380; *C., B. & Q. Ry. Co. v. Landauer*, 54 N. W. 976, 36 Neb. 642; *Leggitt v. Railway Co.*, 21 Atl. 996, 143 Pa. 39; *Lloyd v. Railway Co.*, 53 Mo. 509; *Kennon v. Railway Co.*, 26 So. 466, 51 La. Ann. 1599; *Nichols v. Railway Co.*, 28 N. W. 44, 68 Iowa 732; *Taber v. Railway Co.*, 71 N. Y. 489; *Coudy v. Railway Co.*, 85 Mo. 79; *Santer v. Railway Co.*, 66 N. Y. 50, 23 Am. Rep. 18; *Millman v. Railway Co.*, 66 N. Y. 642; *Keating v. Railway Co.*, 49 N. Y. 673; *Wood v. Railway Co.*, 49 Mich. 370, 13 N. W. 779; The latter case was very similar to the case at bar and a recovery by plaintiff was sustained. In *Keating v. Railway Co.*, supra, it was held negligent to start a train with "a violent jerk and without any signal, and without any examination by those in charge to ascertain whether any one was getting on or off." We concede the correctness of the rule contended for by defendant's counsel that, if the train was stopped a sufficient length of time for plaintiff to alight in safety, and she failed to avail herself of the opportunity thus afforded her, and without fault of defendant's servants and without their knowledge she attempted to alight as the train was started and was injured, she could not recover; but we hold that, under the evidence in this case, it was for the jury and not the court to say whether or not the facts bring the case within this rule. See foregoing authorities.

Upon the question of plaintiff's contributory negligence, we are agreed that it was for the jury to say, under all the evidence in the case, whether or not plaintiff, at the time of the injury in question, was in the exercise of such care as a reasonably prudent person would be expected to exercise under the like circumstances. *Cameron v. G. N. Ry. Co.*, 8 N. D. 124, 77 N. W. 1016; *Richmond & D. R. Co. v. Powers*, 149 U. S. 42, 13 Sup. Ct. 748, 37 L. Ed. 642; 5 Am. & Eng. Enc. Law (2d Ed) 652, and cases cited. Hence it would have been error to have directed a verdict upon the ground of plaintiff's contributory negligence.

It follows that the judgment appealed from must be reversed, and a new trial ordered. All concur.

(111 N. W. 609.)

FRANK H. STRECKER V. EDWARD RAILSON.

Opinion filed March 12, 1907.

Pleading Foreign Justice's Judgment.

1. A complaint in an action upon a judgment of a justice of the peace of a sister state which fails to allege specifically the facts showing that such court had jurisdiction, both of the subject matter and of the person of the defendant, or that such judgment was "duly given or made," as provided in section 6871, Rev. Codes 1905, or words of the exact equivalent, fail to state facts sufficient to constitute a cause of action.

Proof of Foreign Justice's Judgment — Authenticated Copy Insufficient.

2. A judgment rendered by a justice of the peace of a sister state cannot be proved in this state by an authenticated copy of the record of such justice's court, as neither the act of Congress (Rev. St. section 905 [U. S. Comp. St. 1901, page 677]) nor section 7292, Rev. Codes 1905, relates to the authentication of copies of records of courts of limited jurisdiction in other states.

Same — Transcript of Judgment.

3. A transcript of this judgment having been filed in the office of the clerk of the district court in the county where rendered, it was sought to prove the same by an authenticated copy of the records of the district court, but this was equally inadmissible.

Appeal from District Court, McIntosh County; *Allen, J.*

Action by Frank H. Strecker against Edward Railson. From a judgment of the district court on appeal from a judgment rendered by a justice, defendant appeals.

Reversed and remanded.

A. W. Clyde, for appellant.

In pleading a foreign justice judgment, the facts must be set forth showing the jurisdiction of the subject matter and of the person, as at common law. *Lee v. Terbell*, 33 Fed. 850; *Ault v. Zehring*, 38 Ind. 429; *Halsted v. Black*, 17 Abb. Pr. 227; *Archer v. Romaine*, 14 Wis. 375; *Kronberg v. Elder*, 18 Kan. 150; *Gebhard v. Garner*, 12 Bush. 321; *Karns v. Kunkle*, 2 Minn. 313 (Gill. 268); *Hollister v. Hollister*, 10 How. Pr. 532; *De Noble v. Lee*, 61 How. Pr. 275; *Riddelt v. Harrell*, 71 Cal. 254; *Young v. Wright*, 52 Cal. 407; *Thomas v. Robinson*, 3 Wend. 268; *Scanlan v. Murphy*, 53 N. W. 799; *Pierstoff v. Jorge*, 56 N. W. 735; *Edwards v. Hellings*, 33 Pac. 799; *Spooner v. Warner*, 2 Ill. App. 240; *Snyder v. Snyder*,

25 Ind. 399; Baker v. Flint, 63 Ind. 137; Keys v. Grannis, 3 Nev. 548; Hopper v. Lucas, 86 Ind. 43; Ellis v. White, 25 Ala. 540; McLaughlin v. Nichols, 13 Abb. Pr. 244; Fisher v. Fielding, 32 L. R. A. 236; Cornell v. Barnes, 7 Hill 35; Quivy v. Baker, 37 Cal. 465; Douglas v. Phoenix, 44 N. Y. S. 237, 18 N. Y. Supp. 259; Gum Elastic Co. v. Mexico, 30 L. R. A. 700.

The judgment must be alleged by appropriate words. Brady v. Murray, 19 Ind. 258; Harlow v. Hamilton, 6 How. Pr. 475; Memphis, Col. v. Newton, 2 Handy 163; Pierstorf v. Jorger, supra; Fisher v. Fielding, supra; Croker v. Croker, 18 Ind. 156; Penrose v. Pacific Ins. Co., 66 Fed. 253; Fairbanks v. Bloomfield, 2 Duer 349; 2 Ab. Pl. 331.

Copies of judicial proceedings of other states are admissible as evidence only by statute. 1 Gr. on Ev. (16 Ed.) 501, 507; 17 Cyc. 361, 362. Particularly Justice's Judgment. Magee v. Scott, 32 Pa. St. 539; Geohegen v. Eckles, 4 Bibb. 5.

Statutes relating to copies are applicable only to courts of record. 1 Gr. on Ev. (16 Ed.) 505; Warren v. Flag, 2 Pick. 448; Robinson v. Prescott, 4 N. H. 450; Mahurin v. Beckford, 6 N. H. 567; Silver Lake v. Harding, 5 O. 545; Bryan v. Farnsworth, 19 Minn. 239 (Gill. 198); Duvall v. Ellis, 13 Nev. 203.

Nels Larsen, for respondent.

A judgment of a court of common pleas by transcript from a justice court is admissible. Rowley v. Carron, 117 Pa. St. 52, 11 Atl. 435.

When the official character of justice is certified by a county clerk, justice's certificate to a copy of judgment of his court renders it admissible. Pelton v. Platner, 13 Ohio, 209; Silver Lake Bank v. Harding, 5 Ohio 545.

FISK, J. This appeal is from a judgment of the district court of McIntosh county rendered in plaintiff's favor pursuant to a verdict directed by the court. The action was brought to recover upon an alleged judgment rendered by a justice of the peace of Kandiyohi county, Minn. The errors complained of relate to the sufficiency of the complaint and of the competency and sufficiency of the evidence introduced by plaintiff. The complaint is as follows:

"1. That at the times hereinafter mentioned H. J. Ramsett was a justice of the peace in and for the county of Kandiyohi, state of Minnesota, and under and by virtue of the law of said state had au-

thority as such justice to hold court and had jurisdiction as such to render the judgment hereinafter described. That on the 31st day of December, 1894, the plaintiff recovered a judgment against the defendant of the sum of \$71.53, rendered and given by the said justice of the peace.

2. That at the time hereinafter mentioned Mason W. Spicer was a justice of the peace in and for the county of Kandiyohi, state of Minnesota, and under and by virtue of the laws of said state had jurisdiction as such to make a certified transcript of the judgment above described. That a certified transcript of such judgment was duly made by Mason W. Spicer, and was filed in the office of the clerk of the district court of the county of Kandiyohi, state of Minnesota, which judgment was duly entered and docketed on September 30, 1902, for the sum of \$71.78, and the additional costs of \$1.45, making a total amount of \$73.23.

3. That no part of said judgment has been paid or satisfied, and that there is now due and owing to said plaintiff, who is now the legal owner and holder of said judgment, from the said defendant upon the said judgment, the sum of \$73.23, with interest," etc.

The answer consists of a general denial. Counsel for defendant attacked the sufficiency of the complaint by motion to dismiss made prior to the trial, and by a like motion made at the close of the testimony, which motions were denied and exceptions allowed by the court. The specific objections to the complaint were:

1. That it contains no allegations that the pretended judgment was duly rendered or made, or that the court therein mentioned had jurisdiction of the subject matter or of the person of this defendant, and no fact is alleged showing that said court had jurisdiction of the subject-matter or of the person of this defendant.

2. That the complaint does not set forth the pretended judgment either in terms or in substance according to its legal effect, or otherwise allege the judgment or determination of the court on which the action is founded."

At the proper time the defendant objected to the introduction of any evidence under the complaint upon the same grounds stated in the motion, which objection was overruled and an exception saved. We think these rulings constitute error.

It is well settled that in pleading a judgment of a court of special or limited jurisdiction all the facts must be alleged specifically showing jurisdiction both of the subject-matter and of the person, unless

the statutory method prescribed in section 6871, Rev. Code 1905, is followed. 11 Enc. Pl. & Pr. 1134; 23 Cyc. 1515, and cases cited; Phillips on Code Pleading, sections 374, 375; Hopper v. Lucas, 86 Ind. 34; Shockney et al. v. Smiley, 13 Ind. App. 181, 41 N. E. 348; Mears v. Shaw, 32 Mont. 575, 81 Pac. 338; People v. Bacon, 37 App. Div. 414, 55 N. Y. Supp. 1045; Hunt v. Dutcher, 13 How. Prac. (N. Y.) 539; Harmon v. Comstock, etc., Co., 9 Mont. 243, 23 Pac. 470; Weaver v. English, 11 Mont. 84, 27 Pac. 396. In this state, as well as nearly, if not all the states of the Union, the necessity of setting forth all the facts showing jurisdiction as required at common law is dispensed with by statute. The statutory rule is similar in all the states, and in this state it provides that, "in pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading shall be bound to establish on the trial of the facts conferring jurisdiction." Rev. Codes 1905, section 6871. While there is some diversity of opinions among the decisions of the courts, we think the weight of authority is that such statute applies to judgments of inferior courts of sister states, as well as to all other judgments. 23 Cyc. 1516; 11 Enc. Pl. & Pr. 1040; Phillips' Code, Pl. section 375; Maxwell Code Pl. 90. There is also some little diversity of opinion as to whether this statute must be strictly complied with in order to reap the benefit of it; but the weight of authority seems to be that the pleading must be couched in the exact words of the statute, or in words of exactly the equivalent meaning. And this we believe to be the correct rule. As stated in Phillips in his work on Code Pleading (section 375): "The word 'duly' seems to be essential. An averment that 'judgment was rendered,' or that 'a judgment was entered,' is not sufficient." See 23 Cyc. 1516, and 11 Enc. Pl. & Pr. 1138, and cases cited; also Mears v. Shaw, 32 Mont. 575, 81 Pac. 338; Shockney v. Smiley, 13 Ind. App. 181, 41 N. E. 348; People v. Bacon, 37 App. Div. 414, 55 N. Y. Supp. 1045. The complaint in the case at bar does not conform to the statute above mentioned. It alleges merely that the plaintiff recovered a judgment against the defendant for the sum of \$71.53, rendered and given by the said justice of the peace; nor does it allege facts showing that the justice had jurisdiction of the subject of the action and of the person of the defendant. It merely alleges a conclusion of law that

the justice had jurisdiction as such to render the judgment sued upon. We therefore hold that this complaint fails to state facts sufficient to constitute a cause of action, and the defendant's objection thereto was well founded, and should have been sustained.

This brings us to appellant's third assignment of error, which is that the court erred in overruling his objection to the introduction of plaintiff's Exhibit A. This exhibit consists of an exemplification of the record of the proceedings in the justice's court in the action in which the judgment in suit is alleged to have been rendered, and the appellant's objection is aimed at the competency of such proof; he contending that a foreign justice's court judgment cannot be proved in this manner. In this we think he is clearly correct. Neither the act of congress (Rev. St., section 905, [U. S. Comp. St. 1901, p. 677]) nor Revised Codes N. D. 1905, section 7292, relating to the authentication of copies of judicial records of other states, applies to the records of courts of limited jurisdiction. Enc. Pl. & Pr. 842; 2 Elliott on Ev., sections 1374, 1375, and cases cited; 23 Cyc. 1568. This being true, plaintiff could prove such judgment only by the methods known to the common law or as other facts are proved.

Plaintiff, evidently with intent to obviate the above objection, sought to introduce Exhibit B, which purports to be an abstract of the judgment of the justice on file in the office of the clerk of the district court of Kandiyohi county, Minn., authenticated in the manner required for the authenticating foreign judicial records, and defendant complains of the ruling of the trial court in receiving the same in evidence. This ruling was also erroneous. The filing of such abstract in the clerk's office did not make such judgment thereafter a judgment of the district court (Phelps v. McCollam, 10 N. D. 536, 88 N. W. 292), and hence such authenticated copy was clearly incompetent.

The two exhibits above mentioned being the only evidence offered by plaintiff to prove his cause of action, defendant's motion made at the close of the testimony to dismiss the action for failure of proof should have been granted.

For the foregoing reasons, the judgment appealed from is reversed, and the cause remanded for further proceedings according to law, appellant to recover his costs and disbursements in both courts. All concur.

(111 N. W. 612.)

ROBERT STANDORF v. BENJAMIN F. SHOCKLEY AND SARAH E. SHOCKLEY.

Opinion filed March 12, 1907.

Equitable Mortgage — Form of Instrument.

1. An instrument in form a chattel mortgage, but evidently intended by the parties as security on real property, will be construed to be an equitable mortgage, and will be enforced as such as between the parties thereto and those having notice thereof.

Same — Reformation Not Necessary to Foreclose.

2. It is not necessary to reform such instrument in order to enforce the same in a suit in equity.

Appeal from District Court, Stutsman County; *Burke, J.*

Action by Robert Standorf against Benjamin F. Shockley and Sarah E. Shockley. Judgment for plaintiff. Defendants appeal.

Affirmed.

J. A. Coffey, for appellants.

Where the terms of an instrument are uncertain, the intent governs. *Rosenbaum v. Foss*, 63 N. W. 538; 1 *Jones on Mortgages*, Sec. 60.

Jerome Parks, for respondent.

A wife is not a bona fide purchaser of land from her husband, when she knew the terms on which he bought the land, and the conveyance to her was in furtherance of an attempt to get the property for an inadequate consideration. *Williams v. Hamilton et al.* 73 N. W. 1029; *McMaken v. Niles*, 60 N. W. 199; *Swartz v. Woodruff*, 93 N. W. 1067; *Lynch v. Englehardt—Winning-Davison Mercantile Co.*, 96 N. W. 524; *Bucholz v. Leadbetter*, 11 N. D. 473, 92 N. W. 830.

Fisk, J. The plaintiff, claiming to have a lien upon the real property described in the complaint, brought this action to foreclose the same; and from a judgment in his favor defendants have appealed to this court for trial de novo.

The facts out of which plaintiff's cause of action arises, and which are necessary to a correct understanding of the questions involved, are as follows. On October 31, 1899, one Edgar G. Cady, being the owner of the property in question, entered into a contract to sell

and convey the same to the plaintiff. On April 23, 1901, the plaintiff assigned his interest in this contract to the defendant, Benjamin F. Shockley, the latter agreeing to pay therefor the sum of \$800 according to the terms of two promissory notes executed and delivered by him at that time to the plaintiff, one for \$100, due November 1, 1901, and the other for \$700, due November 1, 1902. He also executed and delivered to plaintiff an instrument in form of a chattel mortgage, which was prepared evidently by a person not learned in the law and of meager experience in business transactions, which instrument contains the following recitals: "Know all men by these presents, that I, B. F. Shockley, * * * for the purpose of securing payment of \$800.00 and interest according to the conditions of two promissory notes (describing them) hereby sell and mortgage unto Robert Standorf of Courtenay, North Dakota, and his assigns, the following described property, now in my possession, owned by me and free from incumbrance, to wit: a certain contract dated October 31, 1899, made by Edgar G. Cady to Robert Standorf for the Southeast quarter of section twelve, township one hundred forty-three, range sixty-two, to be fulfilled by B. F. Shockley. If not fulfilled by B. F. Shockley, to revert back to Robert Standorf. This mortgage is for the purchase price of said land in part." It also contained other conditions common to chattel mortgages, including a power of sale to be exercised in case of default. The evidence does not show that this instrument was filed or recorded, but we deem this immaterial, as no rights of innocent parties are involved. The note for \$100 was paid, but the note for \$700 and interest is still due and unpaid. On February 12, 1903, Cady, at the request of defendant, Benjamin F. Shockley, executed and delivered a warranty deed of the premises to Sarah E. Shockley, the other defendant, who is the wife of Benjamin F. Shockley. The funds for paying the balance of the purchase price of the land due to Cady were procured by a loan negotiated through H. N. Tucker Company from the Iowa Land Company, and secured by a mortgage upon the premises executed by both defendants. The record discloses that Benjamin F. Shockley in procuring this deed and in negotiating the loan acted for his said wife, and she knew the purpose for which the loan was made, and also knew of the contract for deed from Cady to plaintiff and the assignment thereof by plaintiff to her husband, and she also had knowledge of the giving of the so-called chattel mortgage by her husband to plaintiff.

The complaint alleges the assignment of the Cady contract to defendant, B. F. Shockley, and the execution and non-payment by him of the \$700 note, the giving of the instrument above described to secure the payment of said note and interest; also that the defendant, Sarah E. Shockley, holds by purchase from Edgar G. Cady, but subject to the contract of sale to plaintiff, and prays for judgment against defendant, Benjamin F. Shockley, for \$808.50, the amount due upon the note, and "that the usual decree may be made for the sale of all of said Benjamin F. Shockley's right, title and interest in and to the premises described in said mortgage. * * * and that the said defendant and all persons claiming under him subsequent to the execution of said mortgage upon said premises, either as purchaser, incumbrancer, or otherwise, may be barred, * * * and for such other or further relief in the premises as to this court may seem meet and equitable." The trial court found that plaintiff has a lien, by virtue of the mortgage aforesaid, upon the real property in question, subject, however, to the mortgage given by defendants above mentioned, and ordered judgment for the sale of the premises to satisfy such lien.

Counsel for appellant contend that the instrument above referred to was both in form and legal effect nothing more than a chattel mortgage upon the contract, and that it furnished no basis for the lien which the judgment fastens upon the land. We think this contention is clearly untenable. While the instrument does not in express terms mortgage the land, we think it clearly shows an attempt to do so; and the evident intention of the parties was that it should operate as security upon the real property for the amount due plaintiff as represented by such notes, and, this being true, equity will treat it as an equitable mortgage. We see no insuperable obstacle in the way of a court of equity giving effect to this instrument according to the clear intent of the parties. In fact, to our minds, under the facts disclosed by this record, it would be grossly inequitable, and would be a most flagrant perversion of the principles of equity jurisprudence, to deny to plaintiff the relief asked for. Authorities are numerous in support of our conclusion that the instrument in question should be held to be an equitable mortgage. Following are some of them: *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999; 11 Am. & Eng. Enc. Law (2d Ed.) 123, and numerous cases cited; 20 Am. & Eng. Enc. Law (2d Ed.) 909, and cases cited; 3 Pom. Eq. Jur., section 1237; 2 Story on Eq. Jur., section 1231; 1 Jones on Mortgages, section 162.

In 11 Am. & Eng. Enc. Law, p. 130, it is stated that "as a general rule an assignment by the vendee of a contract for the purchase of land, made as a security for a debt, makes the assignee an equitable mortgagee." In 3 Pom. Eq. Jur., section 1237, the rule is well stated as follows: "The form or particular nature of the agreement which shall create a lien is not very material, for equity looks at the final intent and purpose rather than at the form; and, if the intent appears to give, or to charge, or to pladge property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified, the lien follows. * * * The intent to give a security being clear, equity will treat the instrument as an executory agreement for such security"—citing numerous authorities. In Jones on Mortgage, *supra*, the author remarks: "In addition to these formal instruments which are properly entitled to the designation of mortgages, deeds and contracts, which are wanting in one or both of these characteristics of a common law mortgage, are often used by both parties for the purpose of pledging real property, or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of parties in such cases, and gives effect to their intention. Mortgages of this kind are therefore called equitable mortgages." 1 Jones on Mortgages, section 162. We deem the rule to be too well settled to require further citations.

Nor was it necessary that plaintiff should have asked to reform the instrument. *Sprague v. Cochran*, 144 N. Y. 104, 38 N. E. 1000; *Love v. Sierra Nevada, etc., Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Cummings v. Jackson*, 55 N. J. Eq. 805, 38 Atl. 763.

As respects the interests of defendant, Sarah E. Shockley, in the premises in controversy, it is sufficient to say that the evidence discloses that she took her title with notice of plaintiff's rights, and her title must therefore be held subordinate to such rights.

The judgment of the district court was in all things correct, and is accordingly hereby affirmed, respondent to recover his costs on this appeal. All concur.

(111 N. W. 622.)

JOSEPH SIM, GEO. O. STOMNER AND MARTIN L. RUDE, MEMBERS
OF THE BOARD OF COUNTY DRAIN COMMISSIONERS OF TRAILL
COUNTY, NORTH DAKOTA, v. JOHN K. ROSHOLT.

Opinion filed May 9, 1907.

**Drains — Jurisdiction of Drain Commissioners — Withdrawal of
Names from Petition.**

1. Under section 1821, Rev. Codes 1905, relating to the establishment of drains, the jurisdiction of the board of drain commissioners to order such drain is acquired by the filing with the board of a petition as therein required, and after such jurisdiction is thus acquired, and the board has taken action thereunder, it cannot be divested of such jurisdiction by the action of the petitioners in withdrawing their names from the petition.

Practice — Directed Verdict — Judgment Notwithstanding the Verdict.

2. At the conclusion of the testimony, both parties moved for a directed verdict, there being no issue of fact involved. The trial court granted the defendant's motion. Subsequently plaintiffs moved for judgment notwithstanding the verdict, which was, on April 11, 1906, denied. Thereafter, and on June 29th, the trial court made an order reversing its previous ruling and ordering judgment in plaintiff's favor notwithstanding the verdict. *Held*, that the court had jurisdiction to make the latter order, and that no error was committed in so doing.

Appeal from District Court, Traill County; *Pollock, J.*

Action by Joseph Sim and others against John K. Rosholt. Judgment for plaintiffs, and defendant appeals.

Affirmed.

P. G. Swenson and *John A. Sorley*, for appellant.

A petitioner can withdraw his name before the petition is acted upon. *Mack v. Polecat Drainage Dist.*, 74 N. E. 691; *Littel v. Board of Supervisors*, 65 N. E. 78; *Black v. Thompson*, 13 N. E. 409; *LaLonde v. Board of Supervisors*, 49 N. W. 960; *State v. Board of Supervisors*, 60 N. W. 266; *Slingerland v. Norton*, 61 N. W. 322; *State v. Commissioners*, 4 N. W. 373.

Theo. Kaldor and *J. F. Selby*, for respondents.

Petitioners may withdraw their names if they move before the board rules upon the sufficiency of it, otherwise their right is waived. *Black v. Thompson*, 13 N. E. 409; *Selbert v. Lovell et al.*, Super-

visors, 61 N. W. 197; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841; *Alstad v. Sim*, 109 N. W. 66, 15 N. D. 629; *Currie v. Paulson*, 45 N. W. 854; *Gerber v. Board of Com.*, 94 N. W. 886; *Damrell v. San Joaquin Co.*, 40 Cal. 154; *In re Grove St.*, 61 Cal. 438; *Far. & Mer. Bank v. Board of Equalization*, 32 Pac. 312.

FISK, J. This is an appeal from a judgment of the district court of Traill county, rendered in favor of plaintiffs, as members of the board of drain commissioners of said county, condemning a right of way for a drain across defendant's land. It was stipulated at the trial that defendant's damages for the taking of the land sought to be condemned was \$200, and the sole question in dispute was as to whether or not the plaintiffs had jurisdiction to construct the proposed drain; it being defendant's contention that while the petition for the construction of the drain, when first presented to the board, contained the requisite number of signatures, prior to the final action of the board in ordering the construction of such drain, enough of such signers or petitioners had asked to withdraw their signatures from the petition to reduce the number of petitioners below that required by law, and that by such request the board was divested of jurisdiction to order the drain constructed, and hence that its order to that effect made on July 7, 1905, was illegal and void. Defendant contends, as we understand him, that the petitioners for this drain had the legal right to withdraw their names from the petition at any time prior to July 7, 1905, the date of the final order establishing the drain. If he is correct in this contention, then a verdict should have been directed in his favor by the trial court; otherwise it should have been directed in plaintiff's favor. The petition for the establishment and construction of this drain was presented to the board on June 29, 1904, and contained the signatures of 11 freeholders, and that at a meeting of the board on said date such petition was formally received and acted upon by the board, and such board made a determination that such petition was signed by the requisite number of qualified petitioners, and ordered such petition to be received and placed on file. The board thereafter fixed June 30, 1904, as the date for it to examine the line of the proposed drain, which was done, and a report made changing in some respects the course of such proposed drain, and at its meeting on July 1, 1904, the board unanimously decided that the proposed drain was needed, and on motion it was ordered that the county surveyor be directed to prepare a survey of such proposed drain in accordance

with the changes recommended by the board, and to make report of such survey at the earliest possible date. At a meeting of the board held on July 19, 1904, six of the petitioners presented to the board a written document signed by them stating that they withdraw their names from the petition; but the board apparently ignored such attempt to withdraw.

We are squarely confronted with the question, therefore, as to the effect upon the jurisdiction of the board of the attempted withdrawal from the petition of the six persons, as above stated. Section 1821, Rev. Codes 1905, relating to drains, provides that the initiatory step to be taken to establish a drain shall be the presentation to the board of drain commissioners of a petition in writing, and if the chief purpose of the drain is the drainage of agricultural, meadow, grazing, or other land, the same shall be signed by at least six free holders, whose property shall be affected by the proposed drain. It also provides that, upon the presentation and filing of such petition, the members of the board shall personally proceed to examine the line of the proposed drain, and, if in their opinion it is necessary, they shall cause a survey of the line thereof to be made and profiles, plans, and specifications to be prepared, also an estimate of the cost thereof, and a map or plat of the land to be drained, etc. These preliminary steps were commenced, but how far they had progressed prior to the time these six petitioners served notice of the withdrawal of their names from the petition does not clearly appear, nor in our opinion is this material. If these persons had a right on July 19th to withdraw their names from the petition, and by so doing oust the board of jurisdiction to proceed further, then we think they had such right at any time prior to the final action of the board in ordering the drain established, and such we understand, as before stated, to be the contention of appellant's counsel. Numerous authorities are cited in appellant's brief in support of this contention. These are: *Mack v. Polecat Drainage District*, 74 N. E. 691, 216 Ill. 56; *Littel v. Board of Supervisors*, 65 N. E. 78, 198 Ill. 205; *Black v. Campbell*, 13 N. E. 409, 112 Ind. 122; *La Londe v. Board of Supervisors*, 49 N. W. 960, 80 Wis. 380; *State v. Board of Supervisors*, 60 N. W. 266, 88 N. W. 355; *Hays v. Jones*, 27 Ohio St. 218; *Hord v. Elliott*, 33 Ind. 220; *Slingerland v. Norton*, 61 N. W. 322, 59 Minn. 351; and *State v. Commissioners*, 4 N. W. 373, 10 Neb. 32.

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Upon examination it will be found that most of these cases relate to petitions for the removal of county seats, or are based upon a statute different from ours, and it will also be found that they do not support the right of petitioners to withdraw their names after the sufficiency of such petition and the qualifications of the petitioners have been passed upon by the board authorized to act thereunder. On the contrary, they will be found to support respondent's theory that, after the board has passed upon the sufficiency of such petition, it is thereafter too late to withdraw therefrom. In *Black v. Thompson*, one of the cases relied upon by appellant, it was held that, "if the dissatisfied petitioners had not moved for leave to strike off and withdraw their names before the board ruled upon the sufficiency of the petition, their right to so move would have been waived." And again, on page 412 of 13 N. E. (112 Ind. 122), is said: "The conclusion reached in this case as to the time and the circumstances under which names may be withdrawn from the petition is not in conflict with either the case of *Forsythe v. Kreuter*, 100 Ind. 27, or that of *Crume v. Wilson*, 104 Ind. 583, 4 N. E. 169, above cited. The first of these was a highway case, and the latter was a case for drainage. In both of these cases notice of the presentation of the petition was required and the sufficiency of the petition as a jurisdictional question had to be considered and ruled upon, before appointing reviewers in one case, and before referring the subject matter of the petition to the drainage commissioners in the other. In this case, notice was neither given nor required until after the viewers and an engineer were appointed and the time for their meeting was fixed, and, for the reasons given, no question arose as to the ultimate sufficiency of the petition until after the report of the viewers and the engineer had been made. Up to that time all the proceedings were merely preliminary to the ultimate sufficiency of the petition as stated." In *Mack v. Polecat Drainage District*, also cited by appellant, the court used the following language: "The signing of such petitions is not an irrevocable act, and that it may be revoked at any time before the jurisdiction of the body authorized to act has been determined by it."

We are clear that after the board passed upon the sufficiency of the petition and ordered the same received and filed, and, after it had proceeded to act thereunder, its jurisdiction to take all subsequent steps necessary to the establishment of a drain thereby attached, and it could not thereafter be ousted of such jurisdiction by

the action of any of the petitioners in attempting to withdraw their names from such petition. In support of our views we call attention to the following authorities: *Seibert v. Lovell*, 92 Iowa, 507, 61 N. W. 197; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841; *Alstad v. Sim* (N. D.), 109 N. W. 66; *Gerber v. Board of Commissioners*, 94 N. W. 886, 89 Minn. 351. In *Seibert v. Lovell*, the Supreme Court of Iowa, in speaking upon this question, said: "We hold, then, that the question of jurisdiction is to be determined from the petition as it was when filed, and without regard to the subsequent acts of the petitioners. *Richman v. Board*, 70 Iowa 630, 26 N. W. 24, and 77 Iowa 513, 42 N. W. 422, 4 L. R. A. 445, 14 Am. St. Rp. 308. So far as affecting the jurisdiction which had already attached was concerned, the protests and remonstrances were of no effect. They were proper to be taken into consideration by the board in passing upon the merits of the petition, but they were not available for any other purpose. It must be remembered that jurisdiction does not attach as of the day when the board acted, but as of the date when the legal petition was filed. The power to act having been conferred upon the board, by virtue of a legal petition, it could not be impaired or taken away by the protests, remonstrances, or attempted withdrawals of some of the petitioners." In both of the decisions of this court, above cited, it was distinctly held that the jurisdiction of the board to act was established by the filing of a sufficient petition for the construction of the drain. The jurisdiction of the board to establish the drain having attached by the filing of a sufficient petition, it seems plain under the statute in question, that the retention of such jurisdiction should in no manner depend upon any subsequent act of the petitioners. We are in accord with, and fully approve of, the reasoning in the opinion of the Supreme Court of Iowa as announced in *Seibert v. Lovell*, supra.

This disposes of the principal question involved on this appeal. A question of practice remains to be determined. At the close of the testimony on March 30, 1906, both parties moved for a directed verdict, and, there being no question of fact in controversy, the damages for the taking of the right of way having been stipulated, the trial court denied plaintiff's motion and directed a verdict in defendant's favor. Subsequently, but on the same day, plaintiffs moved for judgment notwithstanding the verdict, which motion was denied on April 11, 1906, and judgment ordered dismissing the action. Thereafter, on May 4, 1906, plaintiff's counsel prepared a notice of intention

to move for a new trial, but the record does not disclose that the same was ever served, or that a motion for a new trial was ever brought on for hearing, but on June 29, 1906, an order was made by the trial judge as follows, omitting the title: "The above-entitled matter coming on before the court to be heard upon motion of counsel for plaintiffs, for judgment notwithstanding the verdict, which was made at the close of the trial of said action, and for a rehearing of the motion and setting aside of the order made April 11, 1906, now, after hearing the arguments of counsel, and due consideration thereof, it is ordered that said motion be and the same is hereby granted. The order made April 11, 1906, is hereby set aside and judgment is ordered to be entered for the plaintiffs, for the relief demanded in their complaint, and the damages to be fixed in favor of the defendant shall be entered in such judgment in the sum of \$200, which amount was stipulated between counsel as being the just compensation for the property taken. Let judgment be entered accordingly. By the court: Chas. A. Pollock, Judge. Dated June 29, 1906." The making of the foregoing order constitutes the basis of appellant's second assignment of error. The contention of counsel for appellant that this order was made at the hearing of a motion for a new trial is not warranted by the printed record. As before stated, the record does not disclose that any such motion was made or considered. Hence the case of *Kernan v. St. Paul City Ry. Co.*, 67 N. W. 71, 64 Minn. 312, cited in defendant's brief, is not in point, and counsel's contention is without merit. From the recitals in said order, it appears that the plaintiffs' counsel moved for a rehearing of their previous motion for judgment notwithstanding the verdict and for an order setting aside such former order. That such practice is permissible has been settled in this state. *Clopton v. Clopton*, 10 N. D. 569, 88 N. W. 562, 88 Am. St. Rep. 749. See, also, *Wolmerstad v. Jacobs*, 16 N. W. 217, 61 Iowa 372; *State v. Daugherty*, 30 N. W. 685, 70 Iowa 439; *Flickinger v. Railway Co.*, 67 N. W. 372, 98 Iowa 358. So far as the printed record discloses, no judgment was ever entered pursuant to the first order. Nothing but a law question being involved, and the trial judge having committed error in making the first order, we know of no reason consonant with sound practice why he should not be permitted, in the interest of justice, to correct such error.

The judgment is affirmed. All concur.
(112 N. W. 50.)

STATE OF NORTH DAKOTA v. ALBERT F. WERNER.

Opinion filed June 1, 1907.

Competency of Jurors — Opinion Based on Rumor and Newspaper Reports.

1. Following the rule announced in *State v. Ekanger*, 80 N. W. 482, 8 N. D. 559, it is *held* that a juror, who states on his voir dire that he has formed and entertains an opinion as to the guilt or innocence of the accused which it will require some evidence to remove, is not disqualified from serving, where it appears that such opinion is based wholly upon newspaper accounts of the transaction and common street gossip, provided it satisfactorily appears to the court that the juror can, and will if accepted, notwithstanding such opinion, fairly and impartially try the case on the testimony adduced and the law as given by the court.

Same — Discretion of Trial Court — Review.

2. The decision of the trial court upon an issue raised by a challenge to a juror for actual bias is entitled to great respect by this court, and will be disturbed only when it clearly appears that there was an abuse of discretion.

Same — Child as Witness — Competency — Discretion of Trial Judge.

3. Whether a child eight years of age possesses sufficient knowledge to comprehend the nature of an oath and is otherwise competent as a witness is for the trial judge to determine within a sound judicial discretion, and the absence of a clear abuse of such discretion this court will not reverse his decision.

Criminal Law — Rape — Physical Capacity — Evidence.

4. Defendant was prosecuted and convicted of the crime of rape in the first degree, and he challenges the sufficiency of the evidence to sustain the verdict. The prosecutrix, at the date of the commission of the offense, was a child only eight years of age, and it is contended that certain medical testimony conclusively demonstrates that the condition of the child, when examined afterwards, was such that the crime could not have been consummated. *Held*, that there was sufficient evidence from which the jury was justified in finding the defendant guilty as charged.

Same — Corroboration of Prosecutrix — Cross-examination.

5. Three days after the commission of the alleged crime the prosecutrix made certain statements to her mother concerning the facts of the case, and the mother was called as a witness and permitted to detail the particulars of such statement over the objection of defendant's counsel. *Held*, that such testimony was competent, in view of the prior attempt on cross-examination of the girl to discredit and impeach her testimony therefore given to the effect that she had

made such statements to her mother, and also in view of the further fact that the defense had brought out on cross-examination a portion of such particulars. The various rules adopted by the courts in other states with reference to the admissibility of proof of such statements, together with the adjudicated cases in support thereof, are referred to in the opinion.

Witnesses — Privileged Communication — Physician's Testimony.

6. The prosecution was permitted, over defendant's objection, to prove by the witness Dr. Todd a certain conversation had between the witness, the defendant and the state's attorney, for the purpose of showing certain admissions of the defendant that he was afflicted with a loathsome disease which the state claimed was communicated by him to this girl. The gist of this conversation was as follows: Mr. Thorp, the state's attorney, asked defendant certain questions relative to his having a venereal disease, and among other questions he asked him what was the matter with him, to which defendant replied: "There is Dr. Todd who treated me. He can tell you." Thereupon Dr. Todd said in effect that defendant had a loathsome disease, naming it. The defense contends that it was improper to permit the doctor to narrate this conversation, for two reasons: First because it violated section 7304, Rev. Codes 1905, which provides that a physician or surgeon cannot be examined as a witness without the consent of the patient as to any information acquired in attending the patient; and, second, because such conversation could not be construed as either an express or implied admission on defendant's part of the fact sought to be proved. Such objection *held* untenable.

Criminal Law — Trial — Reception of Evidence — Rebuttal.

7. The state called Dr. Vidal in rebuttal, and proved by him, over defendant's objection that the same was not proper rebuttal evidence, certain facts relative to the physical condition of the prosecutrix, and also elicited from him as a medical expert an opinion conflicting with opinions given by defendant's witnesses based upon the condition of the child at the date of the trial. *Held* not error.

Appeal from District Court, Stutsman County. Pollock, J.

Albert F. Werner was convicted of rape in the first degree, and appeals.

Affirmed.

J. F. Callahan and Engerud, Holt & Frame, for appellant.

If the juror discloses that he cannot try the case impartially, uninfluenced by his previous opinion, he should be rejected. 1 Thompson on Trials, section 83; *People v. Wilwarth*, 156 N. Y. 566; *State v. Riley*, 78 Pac. 1001; *People v. Suesser*, 64 Pac. 1095.

A child witness with no realization of the obligations of an oath, and of low degree of intelligence, mental development and training even for a child of tender age, is incompetent. *Morey v. Hoyt*, 19 L. R. A. 611.

In prosecution for rape, the mere fact that the prosecutrix made complaint is all that is necessary or admissible to prove. 3 *Greenleaf on Ev.*, section 213; *People v. Mayes*, 6 Pac. 691; *People v. Stewart*, 32 Pac. 8; *Ellis v. State*, 6 So. 768; *Stephen v. State*, 11 Ga. 225; *Thompson v. State*, 38 Ind. 39; *State v. Shettlesworth*, 18 Minn. 208 (Gil. 191); *Baccio v. People*, 41 N. Y. 265; *Kirby v. Territory*, 28 Pac. 1134; *State v. Ivius*, 36 N. J. L. 233; *Reddick v. State*, 34 S. W. 274; *State v. Carroll*, 32 Atl. 235; *Lee v. State*, 74 Wis. 45; *Parker v. State*, 10 Atl. 219.

In rebuttal, only rebutting testimony should be received, unless for good reasons in furtherance of justice, or to cure an evident oversight, the court permits evidence as in the original case. *Rev. Codes*, 1905, section 9984; *People v. Quick*, 25 N. W. 302; *Reddick v. State*, 16 So. 490; *State v. Hunsaker*, 19 Pac. 605; *Williams v. Com.* 14 S. W. 595.

T. F. McCue, Attorney General; *Edward H. Wright*, of counsel; *Geo. W. Thorp*, States Attorney.

If the court is satisfied that the juror can and will try the case impartially, notwithstanding that he may have heard statements, etc., he should be sworn. *Rev. Codes*, 1905, section 9975; *Jones v. People*, 5 Col. 48; *Com. v. Webster*, 5 Cush. 295; 1 *Thompson on Trials*, 79, 80, 81, 82 and 83; *People v. Reynolds*, 16 Cal. 129; *People v. Symonds*, 22 Cal. 349; *State v. Dorsey*, 5 So. 26; *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *State v. Field*, 56 N. W. 276; *Gillhooley v. State*, 58 Ind. 182; *State v. Rose*, 32 Mo. 346; *State v. Wilson*, 85 Miss. 135; *State v. Hoyt*, 48 Conn. 518; *State v. Reed*, 89 Mo. 168, 1 S. W. 225; *State v. Ekanger*, 8 N. D. 559, 80 N. W. 482.

The discretion of the court in admitting the testimony of witness 8 years old was carefully, judicially and fairly exercised. *State v. Reddington*, 64 N. W. 170; *State v. Michael*, 19 L. R. A. 605; *Wigmore on Evidence*, Vol. 1, sections 505, 506 and 509, 1820, 1821.

Prisoner's statement by reference is the same as if made by himself. *Wigmore on Evidence*, Vol. 2, section 1069 and 1070; *Greenleaf on Evidence*, Vol. 1, section 182; *Stevens on Evidence*, ar-

ticle 19; Jones on Evidence, section 265; Chapman v. Twitchell, 37 Me. 59, 58 Am. Dec. 773; Duval v. Covenhoven, 4 Wen. (N. Y.) 564.

Party may waive the right to have privileged statements excluded. 4 Wigmore on Evidence, section 2388; 3 Jones on Evidence, section 779; Gillette on Indirect and Collateral Evidence, section 111; Whar-ton on Criminal Evidence, section 663.

Prosecutrix's statements made after the offense may be proven in detail and identity of person proven. State v. Cook, 61 N. W. 185; State v. Watson, 46 N. W. 868; State v. Hutchinson, 64 N. W. 611; State v. Peterson, 82 N. W. 329; 4 Blk. Com., section 213; Brown v. People, 36 Mich. 203; 2 Crim. Reports, 586; People v. Goulette, 45 N. W. 1124; McCombs v. State, 8 Ohio 643.

Particularly where the prosecutrix is of tender years. Territory v. Keyes, 5 Dak. 244, 38 N. W. 440; Territory v. Godfrey, 6 Dak. 481, 50 N. W. 481; People v. Glover, 38 N. W. 874; People v. Brown, 19 N. W. 172; Hanan v. State, 36 N. W. 1; Proper v. State, 55 N. W. 1035; People v. Gage, 28 N. W. 835; State v. Andrews, 105 N. W. 215; State v. Peres, 71 Pac. 162.

Delay in making the complaint only affects the credibility of the witness. State v. Neel, 60 Pac. 510; State v. Wolf, 92 N. W. 673; State v. Halford, 54 Pac. 819; Trimble v. Territory, 71 Pac. 932; 19 Am. & Eng. Enc. Law (1st Ed.), page 961; 2 Wigmore on Evidence, section 1135.

Details of complaint are admissible when it is sought to impeach prosecutrix, or a portion of details is brought out on cross-examination. 1 Elliott on Evidence, section 566; 3 Greenleaf on Evidence, section 213; 4 Elliott on Evidence, section 3099; 4 Elliott on Evidence, section 3102; Wood v. State, 64 N. W. 355; State v. Neel, 60 Pac. 510; Territory v. Maldonado, 58 Pac. 350; State v. De-Wolfe, 8 Conn. 93; 19 Am. & Eng. Enc. Law (1st Ed.), page 960; Griffin v. State, 76 Ala. 29.

FISK, J. Defendant was convicted in the district court of Stutsman county on November 1, 1905, of the crime of rape in the first degree, and from a judgment sentencing him to confinement in the penitentiary for the term of 10 years he has appealed to this court, alleging numerous errors in the rulings of the trial court, and also alleging insufficiency of the evidence to sustain the verdict.

Appellant is about 26 years of age, and the female upon whom it is alleged that he perpetrated this crime is a mere child of about the age of eight years. Defendant for some time prior to the date of the commission of the alleged offense was on very intimate and friendly terms with the parents of the child, and a cousin of the mother, and for about a year prior thereto had resided in the family of the child's parents, during which time Lena, the prosecutrix, often slept in the same bed with him, and at other times she visited him at his own home nearby. The child's parents are German, and have resided in this country but a few years, and, while Lena can understand and speak English to some extent, she has had practically no school advantages, and it is insisted by appellant's counsel that she was unable to comprehend the nature of an oath and not of sufficient intelligence to be a competent witness. The other facts necessary to a complete understanding of the questions involved will be referred to later in this opinion. With this brief statement of the nature of the case, we will proceed to consider the alleged errors assigned by appellant's counsel.

The first three assignments call in question the correctness of the rulings of the trial court in denying defendant's challenges for actual bias of the jurors Corwin, Orlady and Thompson. It is contended, and we think such contention well founded, that, if these rulings were erroneous, they were manifestly prejudicial, as defendant was required to exhaust his peremptory challenges in order to exclude these jurors from the case, and hence was deprived of exercising challenges upon other jurors claimed to have been undesirable. These jurors on their voir dire stated in substance that they had read the newspapers purporting to give the facts involved in the case, and had heard the case discussed by others more or less, and had heard opinions expressed as to the guilt or innocence of the defendant, and that from what they had heard and read they had formed opinions which it would take evidence to change. On being examined further it developed that the opinions which they entertained were based solely upon newspaper articles and current gossip, and that they had no clear and distinct recollection of what they had read or heard, did not know who the witnesses were, and that, if accepted and sworn as jurors, they could and would disregard the opinions or impressions they had formed, and try the case according to the evidence and the law, and that they understood it would be their duty so to do. From a careful examination of their testimony we

are unable to say that the trial judge, in whom is vested by law a very wide discretion in such cases, clearly abused such discretion. As stated in *State v. Church*, 6 S. D. 89, 60 N. W. 143, which language was expressly indorsed by this court in *State v. Ekanger*, 8 N. D. 559, 80 N. W. 482, the decision of the trial court in passing upon the qualifications of jurors "will be treated with great respect by this court, and only reversed when, in its opinion, such decision is clearly wrong." The contentions of counsel for appellant with reference to the matters embraced in these assignments of error are, we think, fully and completely answered adversely to appellant in the opinion of Chief Justice Bartholomew in *State v. Ekanger*, supra, and the rule enunciated in that opinion meets with our unqualified approval, and we believe is sustained by the weight of modern authority. The question is ably treated, and the authorities collated, in 24 Cyc. pp. 286 to 298, inclusive. This disposes of appellant's first three assignments of error.

Appellant's fourth assignment of error, relating to the instructions to the jury, was expressly waived at the oral argument, and hence will not be noticed.

The next assignment relates to the competency as a witness of Lena Kuetchach. As before stated, she was only about eight years of age, and had been afforded but little, if any, school advantages. She was examined at great length, both by counsel and the court, with reference to her general knowledge, and such examination disclosed a somewhat less degree of intelligence than the ordinary child of her age; but, when her lack of advantages are considered, we are unable to say that she is not at least up to the average child of her age intellectually. She made intelligent answers to practically all of the many questions asked her by the court and counsel, and while she disclosed gross ignorance as to some things which a child of her age, but with better advantages, ordinarily is informed regarding, it appears that she quite fully understood and comprehended the import of the questions asked her, and that she as a witness was bound to tell the truth in regard to the facts of the case, and that she would be subjected to punishment for not so doing. Counsel for appellant contend that her preliminary examination before she was sworn, as well as her testimony as a whole after she was sworn, shows such a low degree of intelligence and lack of mental development and training, even for a child of her tender years, that as a matter of law she was incompetent as a witness; and they cite

State v. Michael, 16 S. E. 803, 37 W. Va. 565, 19 L. R. A. 605. The opinion in this case, no doubt, is sound under the facts of the case; but the child whose testimony was rejected was but five years of age, and a very brief examination bearing upon her competency as a witness was made.

The correct rule, and the one adopted by the great weight of modern authorities, is that there is no certain age at which the dividing line between competency and incompetency may be drawn. Intelligence, rather than age, should guide the court in determining the competency of the witness; and the trial court, in the exercise of a sound discretion, after an examination of the witness will determine whether the child possesses sufficient intelligence to comprehend the obligation of an oath. See 3 Jones on Ev. section 738, 739; State v. Juneau, 88 Wis. 180, 59 N. W. 580, 24 L. R. A. 857, 43 Am. St. Rep. 877; State v. Reddington, 64 N. W. 707, 7 S. D. 368; Wheeler v. U. S., 159 U. S. 523, 16 Sup. Ct. 93, 40 L. Ed. 244; State v. Levy, 23 Minn. 108, 23 Am. Rep. 678; 1 Wigmore on Ev. sections 505-507, inclusive. These authorities also hold that the decision of the trial judge as to the competency of the witness will not be disturbed, except for a clear abuse of discretion. Mr. Justice Brewer, in Wheeler v. U. S., said: "The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous." See, in addition to the above, People v. Craig, 111 Cal. 469, 44 Pac. 186; People v. Baldwin, 117 Cal. 244, 49 Pac. 186; People v. Daily, 135 Cal. 104, 67 Pac. 16; People v. Swist, 136 Cal. 520, 69 Pac. 223; State v. King, 117 Iowa 484, 91 N. W. 768; Com. v. Robinson, 165 Mass. 426, 43 N. E. 121; People v. Walker, 113 Mich. 367, 71 N. W. 641; Uthermohlen v. Boggs R. M. & M. Co., 50 W. Va. 457, 40 S. E. 410, 55 L. R. A. 911, 88 Am. St. Rep. 884. In the case last cited the rule is stated thus: "But the true rule is, where the trial court has excluded or admitted a witness in cases of infancy, that there can be no reversal, except in a very palpable, unquestionable case of error, amounting to an abuse of discretion. The cases must be very rare in which there can be a re-

versal for such cause." Considering the facts bearing upon the competency of this witness, as disclosed by the record, we are clear, in the light of the rule above stated, which we think is clearly based upon sound reason, appellant's fifth assignment of error must be overruled.

It is next insisted that the evidence was insufficient to justify the verdict. Appellant contends that there is no proof of penetration, except the testimony of the prosecutrix, and he insists that her testimony was conclusively proven to be untrue by the medical testimony in the case to the effect that the physical condition of the child, as disclosed by an examination afterwards, demonstrated beyond cavil that complete penetration could not have been effected, for the reason that the child's genitals were not lacerated, etc. Conceding this to be true, it by no means follows that there was not sufficient evidence from which the jury was fully warranted in finding that there was, at least, slight penetration, which, under the law, was all that was essential to constitute this element of the offense. It would serve no useful purpose to review at length all the testimony relating to this feature of the case. Suffice it to say that, after eliminating from our consideration this portion of the child's testimony, we are clearly convinced that the remainder of her testimony, considered in connection with the other evidence in the record, was amply sufficient from which the jury might find that there was penetration, within the meaning of the statute (section 8892, Rev. Codes 1905).

Appellant's seventh assignment of error is predicated upon the ruling of the court in permitting the mother of the child to testify as to statements made to her by such child. The testimony complained of related to statements made by Lena to her mother on June 16th, being three days after the offense was committed, in which she told her mother, in effect, that defendant had taken indecent liberties with her person. These statements were merely hearsay, and were incompetent, therefore, in chief, to prove the commission of the offense unless they come within some exception to the general rule as to hearsay testimony. The courts hold quite generally, however, that it is proper to prove that the prosecutrix, recently after the commission of the offense, made complaint to others as to the commission of such offense, basing their decision upon the ground that such testimony is admissible as being in corroboration of her testimony in court. Other courts base their decisions, sustaining the ad-

missibility of such testimony, upon the ground that such statements are a part of the *res gestæ*; while others give as a reason for the rule that the failure to complain of the outrage is a circumstance indicating that the female was a consenting party to the act. The latter reason does not appeal to us with much force; for, if such is the reason upon which the rule is based, then such rule could not well apply to a case such as this, where the outraged female is but eight years of age, and hence below the age of consent. If the rule is to apply at all, we think it certainly should apply in a case of this kind. We think the better rule is that such proof may be admissible as part of the *res gestæ*, if the statement was made immediately following the commission of the crime, in which event the particulars of the complaint may be proved as part of the state's case in chief, the same as any facts which are a part of the *res gestæ*. We think such testimony is also admissible in corroboration of the testimony of the prosecutrix, in which event it is unnecessary that statements should have been made so recently after the commission of the offense as to make it a part of the *res gestæ*. In most jurisdictions such testimony in the first instance is restricted to a mere statement of the fact that a complaint was made without disclosing the particulars thereof. 23 Am. & Eng. Ency. Law (2d Ed.) 874, and cases cited. In a few states, however, the courts permit the particulars of such statements to be given in evidence in the first instance for the purpose of corroborating her testimony, even though her credibility has not been attacked by the defense or her testimony in any manner impeached. 23 Am. & Eng. Enc. Law 875, and cases cited. The Supreme Court of Michigan, following the majority rule, hold that the particulars cannot be testified to in the first instance and are not admissible, except that they are brought out on cross examination; but the court recognizes two exceptions to the rule, holding that, if the statements are so intimately connected with the time and place of the crime as to be part of the *res gestæ*, the particulars of such statement are admissible, and also that they are admissible where the prosecutrix is of tender years. *State v. Marrs*, 125 Mich. 376, 84 N. W. 284; *People v. Gage*, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854; *People v. Glover*, 71 Mich. 303, 38 N. W. 874. The last exception above mentioned seems to have been recognized, also, by the Supreme Court of Wisconsin. See *Bannen v. State*, 91 N. W. 107, 115 Wis. 317, and cases cited.

It is unnecessary for us, in disposing of the case at bar, to commit ourselves to any of the foregoing rules, as it seems to be well settled by the adjudications that after the particular testimony of the prosecutrix has been attacked, or her credibility questioned by the defense, the state may prove the particulars of such statement, either by her or by the person to whom such statement was made, and, when the defense elicits on cross examination a portion of such particulars, it is competent for the state thereafter to prove the whole thereof; also that a cross-examination aimed at the impeachment of the prosecutrix as to such statement, entitles the state to show all the particulars. 23 Am. & Eng. Enc. Law 875, and cases cited; 3 Greenleaf on Evidence, section 213; 4 Elliott on Evidence, sections 3099, 3102; *State v. Neel*, 60 Pac. 510, 21 Utah 151; *Wood v. State*, 64 N. W. 355, 46 Neb. 58; *Territory v. Maldonado*, 58 Pac. 350, 9 N. M. 629; *State v. De Wolfe*, 8 Conn. 93, 20 Am. Dec. 90; *Griffin v. State*, 76 Ala. 29, 19 Am. & Eng. Enc. Law (1st Ed.) 960, and cases cited. Following the rule above announced, which we believe to be sound, we are of the opinion that it was not error for the trial court, under the facts disclosed by the record, to permit the mother to testify to the particulars of such complaint; the defense having, on cross-examination of the little girl, brought out a portion thereof and sought by such cross-examination to elicit facts tending to discredit and impeach the child's testimony in reference thereto.

Appellant's eighth assignment of error challenges the correctness of the rulings of the trial court in permitting the witness Dr. Todd to testify that defendant was afflicted with a certain loathsome disease and in refusing to strike out such testimony. It appears that this witness had treated defendant for a venereal disease during the winter and spring of 1905. Counsel for appellant most vigorously insist that these rulings were erroneous. The testimony objected to related to a conversation had between the witness and the state's attorney, Mr. Thorp, and the defendant, while these three persons were riding together in June, 1905, during which conversation Mr. Thorp asked defendant certain questions relative to his having a certain venereal disease, and, among other questions, he asked him what was the matter with him, to which he replied: "There is Dr. Todd, who treated me. He can tell you." Thereupon the doctor said: "He had a hard chancre." It is contended that it was error to permit the doctor to narrate this conversation, as such ruling vio-

lated section 7304, Rev. Codes 1905, which provides that a physician or surgeon cannot be examined as a witness without the consent of the patient as to any information acquired in attending such patient; also that the same could not be construed as either an express or implied admission on defendant's part of the truth of such statement. We are unable to agree with appellant's counsel as to either of these contentions. The doctor was not examined as to any information acquired by him in attending the defendant professionally; but he was examined for the sole purpose of proving the above conversation, which conversation was in no way privileged, and might have been proven as well by Mr. Thorp as by the doctor. The fact, if it be a fact, as contended by counsel for appellant, that the jury would unquestionably construe the same as a statement by the witness of the fact that the defendant was suffering from a disease, instead of construing it correctly as a mere narrative of the conversation above mentioned, does not make it less competent than would have been the testimony of Mr. Thorp to the same effect; and his testimony would have been clearly competent. We think the testimony admissible as tending to prove an admission on defendant's part, by implication, at least, that he was afflicted with a loathsome disease. See, as supporting this view, 2 Wigmore on Evidence, sections 1069, 1070; 1 Greenleaf on Evidence, section 182, and cases cited; Jones on Evidence, Vol. 1, section 265; 1 Am. & Eng. Enc. Law, 701, 702 and cases cited. This disposes of appellant's assignment of error No. 8.

The only remaining assignments relate to the rulings of the district court in permitting the witness Dr. Vidal to testify in rebuttal to his examination of the child at the time of the trial, and to state her condition at that time, and also in permitting him to give his professional opinion, based upon such examination and in response to hypothetical questions as to certain matters claimed to be proper only in making the state's case in chief. This witness was called by the state before defendant had finally rested his case, but with the latter's consent, for the purpose of accommodating such witness, who could not be present on the following day. We have examined the testimony of this witness carefully, and are of the opinion that the same was proper rebuttal evidence. The whole scope of this testimony, as we construe the same, merely tended to rebut the medical testimony of defendant's witnesses to the effect that the girl was suffering from eczema, instead of syphilis, and also to offset

their opinion evidence, in so far as it tended to show that, from the condition of the child, penetration could not have taken place. But, even if we should hold that this testimony was not all strictly rebuttal, it would not necessarily follow that a new trial should be granted. In what manner was the defendant prejudiced in his substantial rights? The record discloses that three of his medical experts resided in the same city where the trial took place, and the other at the city of Casselton, and it does not appear, therefore, that these witnesses were not easily accessible. Furthermore, defendant's counsel did not even intimate to the trial court that he desired to rebut any of this testimony, or to be given time in which to procure the attendance of his medical experts. Again, it is well settled that the trial court is vested with a broad discretion in regard to the order of proof at trials, and, except in cases of a clear abuse of such discretion, his decision will not be disturbed. Section 9984, Rev. Codes 1905, as we construe the same, does not change the general rule regarding the order of proof in criminal cases. For a discussion of such rule, see 3 Wigmore on Evidence, section 1867 et seq.; 2 Elliott on Ev., section 811, and cases cited; also 15 Enc. of Pl. & Pr., pages 383-393.

Finding no error in the record, the judgment appealed from is affirmed. All concur.

(112 N. W. 60.)

STATE OF NORTH DAKOTA, EX REL., G. L. BICKFORD v. J. W. FABRICK, AS COUNTY AUDITOR.

Opinion filed April 25, 1907. Rehearing denied May 31st, 1907.

Mandamus is a Special Proceeding — Trial De Novo.

1. A mandamus proceeding is not an action under sections 6741, 6742, and 6743, Rev. Codes 1905, being a special proceeding. Under section 7229, Rev. Codes 1905, only actions are triable de novo in the Supreme Court, and this does not contemplate the trial de novo of special proceedings.

Same — Review — Statement of the Case.

2. A statement of the case on appeal in a mandamus proceeding which does not contain specifications of error does not admit of a review of anything except the judgment roll.

County Superintendent — Term of Office.

3. Under the statute of this state providing that the term of office of the county superintendent of schools shall be two years, commencing on the first Monday in January following his election, and until his successor is elected and qualifies, a duly elected and qualified and acting county superintendent of schools continues such superintendent until his success or is elected and qualifies.

Same — Compensation.

4. A county superintendent, lawfully holding over after the expiration of two years from his qualification as superintendent, and continuing to perform the duties of the office, is entitled to the compensation provided by law for the incumbent of such office.

Appeal from District Court, Ward County; *Fisk, J.*

Application by the state, on the relation of G. L. Bickford, for writ of mandamus against J. W. Fabrick, auditor of Ward county. Judgment for relator, and defendant appeals.

Affirmed.

C. N. Frich, attorney general; *Geo. A. McGee*, state's attorney; and *Joseph Denoyer*, assistant state's attorney, for appellant.

When contestant's predecessor had been declared elected and had qualified, and entered upon her duties, such contestant could not be treated as his own successor in office. *State v. Callahan*, 4 N. D. 481, 61 N. W. 1025; *Stevens v. Carter*, 31 L. R. A. 342.

Palda & Burke, and *Burke & Middaugh*, for respondent.

One holding office after the expiration of the term thereof, "and until his successor is elected and qualified," is both a *de facto* and *de jure* officer. *State v. Sullivan*, 11 L. R. A. 272; *State v. Benedict*, 15 Minn. 198 (Gil. 153); *People v. Tilton*, 37 Cal. 614; *State v. Berg*, 50 Ind. 501; *Stevenson v. Smith*, 87 Mo. 158; *Lee Savings Bank v. Hunt*, 72 Mo. 597, 37 Am. Rep. 449; *Lowe v. Seay*, 72 Mo. 648; *State v. Howe*, 18 Am. Rep. 321; *Badger v. U. S.*, 93 U. S. 599, 23 L. Ed. 991; *Placer County v. Dickerson*, 45 Cal. 12.

Salary is incidental to the legal title to the office, and not to its occupancy or exercise. *Kreitz v. Behrensmeyer*, 24 L. R. A. 59; *People v. Potter*, 63 Cal. 127; *McCue v. Wapello County*, 10 N. W. 248; *Yorks v. St. Paul*, 64 N. W. 565; *Rasmussen v. Co. Com.*, 45 L. R. A. 295; *Merchants Natl. Bank v. McKinney*, 48 N. W. 841; *Flypaa v. Brown County*, 62 N. W. 962.

The rights and duties of an incumbent of an office continue until his successor has been elected or appointed, and has properly qualified. 23 Enc. of Law (2nd Ed.), page 415; *Badger v. U. S.*, *supra*; *Meyer v. Culver*, 35 Pac. 984; *Carlisle v. Henderson*, 17 Colo. 532; *State v. Menaugh*, 51 N. E. 117; *State v. Smith*, 63 N. W. 453; *State v. Marr*, 68 N. W. 8; *Richards v. McMillan*, 54 N. W. 566; *State v. Compson*, 34 Ore. 25; *State v. Meilike*, 81 Wis. 574.

SPALDING, J. This is an appeal from a judgment of the district court of Ward county commanding the defendant, as auditor of such county, to draw his warrant to the relator for \$3,997.46 as salary as superintendent of schools of that county for the years 1903 and 1904. The appellant evidently intended to have this court try this case anew; but it is not an action, within the meaning of section 7229, Rev. Codes 1905, and his statement of the case contains no specifications of error, we cannot consider the evidence contained in the statement, but can only determine whether the judgment is sustainable from a consideration of the judgment roll. Section 7229, Rev. Codes 1905, only provides for the trial anew by the Supreme Court of actions. It does not include special proceedings, and there is a wide distinction between the two. This court has already held that contempt cases are not included in section 7229, and they are at least analogous to mandamus proceedings, and have often been held to be special proceedings. *Township of Noble v. Aasen*, 10 N. D. 264, 86 N. W. 742. This court has also held that a disbarment proceeding is a special proceeding. *In re Eaton*, 7 N. D. 269, 74 N. W. 870. The Code defines actions and special proceedings. Remedies in the courts of justice are divided into (1) actions and (2) special proceedings. Rev. Codes 1905, section 6741. An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the protection or enforcement of a right, redress or prevention of a wrong, or the punishment of a public offense. Rev. Codes 1905, section 6742. Every other remedy is a special proceeding. Rev. Codes 1905, section 6743. Chapter 41 of the Revised Codes of 1905 is entitled "Special Proceedings of a Civil Nature," and includes under article 3 the subject of "Writ of Mandamus."

It appears that the relator was elected, qualified, and acted as superintendent of schools of Ward county during the years 1901 and 1902; that at the general election held in November, 1902, in that county, one Flora J. Frost was elected to such office, and on or

about the 5th day of January, 1903, filed with the county auditor her official oath and bond, with sufficient sureties, as required by law, and thereupon demanded of the relator the delivery to her of the office and supplies of said county superintendent of Ward county, which demand was refused by this relator, and neither the office nor the supplies pertaining thereto were ever delivered to her, and she never performed the duties of the office. About the 8th day of December, 1902, Bickford, the relator, in this proceeding, on his own motion instituted in the district court of Ward county a statutory contest of election against said Frost, to which she duly made answer, and trial was had and judgment rendered and entered by the district court of Ward county on the 2d day of November, 1903, adjudging that Flora J. Frost, the defendant in that proceeding, was not a qualified elector of Ward county at the time of holding the general election in said county in the month of November, 1902, and that she was not eligible to any office in the county and state at that time, and was not entitled to a certificate of election for the office of superintendent of schools of said county for the term beginning January 6, 1903, and the judgment permanently enjoined and restrained the county auditor of Ward county from issuing a certificate of election to her, and awarded the contestant in that proceeding, who is also the relator here, costs. From such judgment the defendant appealed, and her appeal was dismissed for want of prosecution.

Subsequent to the 6th day of January, 1903, Miss Frost made application for a writ of mandate directing this relator to deliver possession of the office, its records, and supplies to her, and on the 2d day of March, 1903, judgment was rendered and entered in the district court of Ward county whereby it was adjudged that a peremptory writ of mandamus issue out of said court directing the defendant in that action, the relator in this, to forthwith surrender and deliver to said Flora J. Frost, said office. An appeal was perfected from said judgment to the Supreme Court, which appeal was on the 7th day of November, 1903, dismissed for want of prosecution.

It is so well settled that a mandamus proceeding is not the proper proceeding by which to determine who is entitled to an office or by which to contest an office that no citation of authorities is necessary. The mandamus proceeding of Miss Frost having been instituted, and judgment having been entered therein, and an appeal taken therefrom while the contest proceedings were pending against her, and such contest proceedings being the statutory method of deter-

mining who is entitled to an office, the judgment in the mandamus proceeding did not in any sense determine who was entitled to the office, and this fact was evidently recognized by all parties, because Bickford filled the office and performed the duties thereof during the term beginning January 6, 1903. Only two questions are involved in this case, as disclosed by the record. The first is whether the relator was the superintendent of schools of Ward county during the years 1903 and 1904; and the second, if he was, is he entitled to the salary affixed to such office for such years?

Section 764, Rev. Codes 1905 (section 638, Rev. Codes 1899), provides that there shall be elected in each organized county, at the same time other county officers are elected, a county superintendent of schools, whose term of office shall be two years, commencing on the first Monday in January following the election, and until his successor is elected and qualified. Under this provision of the statute it appears clear that it provides, not simply for a term of two years, but for two years and any additional time which may elapse before a successor is elected and qualified. The duly elected and qualified superintendent, after the expiration of the two years from his entering upon the duties of the office, unless a successor was duly elected and qualified, was entitled to occupy the office and perform its duties with precisely the same force and effect as though he himself had received the new certificate of election and qualified anew. That this is the law is well established by a vast number of authorities. Under a statute like ours, holding over pending the election and qualification of a successor is as much a part of the term of office to which the superintendent is elected as are the first two years, where he continues in office. *Baker City v. Murphy*, 30 Or. 405, 42 Pac. 133, 35 L. R. A. 88; *State v. Benedict*, 15 Minn. 198 (Gil. 153); *People v. Tilton*, 37 Cal. 614; *State v. Howe*, 25 Ohio St. 597, 18 Am. St. Rep. 321; *Fylpaa v. Brown County*, 62 N. W. 962, 6 S. D. 634; *State v. Smith et al.*, 94 Iowa, 616, 63 N. W. 453; *Badger v. U. S.*, 93 U. S. 599, 23 L. Ed. 991; *State v. Marr*, 68 N. W. 8, 65 Minn. 243; *Richards v. McMillan*, 36 Neb. 352, 54 N. W. 566; *Kimberlin v. State (Ind.)*, 30 Am. St. Rep. 208, and note; *Taylor v. Sullivan (Minn.)*, 22 Am. St. Rep. 729, and note. Unquestionably this statute was enacted with a view to preventing the office of superintendent of schools from becoming vacant during any part of the time, and unquestionably it means just what it says

—in effect that one, once lawfully elected and qualified, continues to hold the office until his successor is elected and qualified.

The statutory contest between these parties and the judgment entered therein determined that Miss Frost could not hold the office, and the findings and judgment in this case determine that this relator continued to hold the office and perform the duties of county superintendent of schools during the years 1903 and 1904, and this question of fact cannot be re-examined in this court on this appeal. It would seem that it must necessarily follow that, as he was the superintendent de jure and the superintendent de facto during the years 1903 and 1904, the salary fixed by law for the incumbent of that office must go to him. This is so firmly established by authority that it cannot be questioned. Some authorities even go so far as to hold that, where the de facto officer has been paid the salary, it is no defense in a proceeding on behalf of the de jure officer for the recovery of the salary. *Fylpaa v. Brown Co.*, 62 N. W. 962, 6 S. D. 634; *State v. Carr (Ind.)*, 28 Am. St. Rep. 163; *Andrews v. Portland (Me.)*, 10 Am. St. Rep. 280, and note.

The legal salary of the superintendent of schools for Ward county in the years 1903 and 1904 was \$1,500 for one year and \$2,000 for the other. The district court found that the relator is entitled to interest, and included it in its judgment. The appellant contends that the judgment provides for more than the relator is entitled to. We are unable to ascertain, from the findings and judgment, whether the amount named is correct, as the dates and methods of computation are not shown in the findings; but they will be presumed to be correct. In any event, the appellant had the opportunity, if a mistake was made in the computation, to call the attention of the district court thereto and have it corrected, where it could readily be done, instead of waiting to first call attention to it in the appellate court.

We are of the opinion that the judgment of the district court should be affirmed. It is affirmed. All concur.

Judge TEMPLETON, of the First judicial district, sitting in place of FISK, J., disqualified.

(112 N. W. 74.)

GUNHILD K. FJONE v. HANS O. FJONE.

Opinion filed May 9, 1907.

Contracts — Undue Influence — Relations of Trust and Confidence.

1. Courts of equity will carefully scrutinize contracts between persons occupying relations of trust and confidence, and if it appears that a contract was entered into through the exercise of undue influence practiced by one party upon the other, or if it is grossly unfair or inequitable, the courts will not hesitate to cancel the same.

Same — Validity of Deed — Burden of Proof.

2. Where an aged woman executed and delivered to her son a deed to all her real property, and it appears from the relation existing between them that the mother was wholly dependent upon her son and reposed implicit trust and confidence in him in their dealings, the burden is upon the son, in an action to cancel such deed, to show that the same was not obtained through undue influence and that it was in all respects fair and equitable.

Appeal from District Court, Ramsey County; *Cowan*, J.

Action by Gunhild K. Fjone against Hans O. Fjone. From a judgment in favor of plaintiff, defendant appeals.

Reversed and remanded, with direction to dismiss the action.

E. Smith-Peterson, for appellant.

Weakness of mind not presumed from age alone. *In re Disbrow's Estate*, 24 N. W. 624; *Shepherdson v. Potter*, 18 N. W. 575.

Undue influence must amount to force or coercion. *Layman v. Conroy*, 60 Md. 286; *Latham v. Udell*, 38 Mich. 238.

Liberty to obey the voice of justice, dictates of kinship and benevolence, claims of kindred in disposing of property, must be recognized. *Wallace v. Harris*, 32 Wis. 297; *Dailey v. Kastell*, 14 N. W. 635; *Marking v. Marking*, 82 N. W. 133; *Smith v. Smith*, 19 N. W. 47; *Giles v. Hodge*, 43 N. W. 163; *Montague v. Allen*, 73 Va. 592; *Post v. Mason*, 91 N. Y. 539; *Carter v. Dickson*, 69 Ga. 82; *Creswell v. Welchman*, 30 Pac. 553.

Fraud and undue influence must be directly connected with the execution of the instrument. *Guild v. Hull*, 20 N. E. 665; *Shea v. Murphy*, 45 N. E. 1021; *Pittenger v. Pittenger*, 70 N. E. 699.

J. G. Johnson, for respondent.

Where a person rendering service is a member of the family of the person served, as a child, relative or visitor, such service is presumed gratuitous, unless express contract is shown. *Cowan v. Musgrave*, 35 N. W. 496; *Moyer's Appeal*, 3 Atl. 811; *Wall's Appeal*, 5 Atl. 220; *Sawyer v. Herbrand*, 3 Atl. 529; *Leary v. Leary*, 32 N. W. 623; *Dodson v. McAdams*, 2 S. E. 453; *Allen v. Allen*, 27 N. W. 702.

Equity will closely scrutinize contracts between persons in confidential relations, and set them aside in the absence of a showing of good faith. *Brummond v. Krause*, 8 N. D. 573, 80 N. W. 686; *Kerr on Fraud and Mistake*, 150, 152; *Leighton v. Orr*, 44 Iowa 679; *Tucke v. Bucholz*, 43 Iowa 415; *Gardner v. Lightfoot*, 32 N. W. 510; *Sprague v. Hall*, 17 N. W. 743; *Thorn v. Thorn*, 16 N. W. 324; *Cole v. Getzinger*, 71 N. W. 75; *Davis v. Dean*, 26 N. W. 737.

FISK, J. The plaintiff, a person about 82 years of age, brought this action against her son in the district court of Ramsey county to annul and cancel a certain deed of conveyance executed by her to defendant on August 20, 1903, conveying 160 acres of land in said county to the defendant. She bases her right to the relief asked upon the ground that she was induced to execute such conveyance through undue influence and fraud practiced upon her by the defendant, and she also alleges a partial failure of consideration. The trial court found for the plaintiff, awarding her the relief prayed for, and the defendant has brought the case to this court for trial de novo.

The record is very voluminous, but we think a brief statement of facts will be sufficient for a proper understanding of the questions involved. The parties were born in Norway; the defendant coming to the United States in 1880, and the plaintiff in 1896. The plaintiff is unfamiliar with the English language and has had no business experience, while the defendant can speak English quite fluently and has had considerable business dealings. For a period of about seven years after establishing her residence in this country, plaintiff made her home with the defendant, the latter supporting and caring for her, and attending to any business matters in which she was interested; and we think it fair to conclude from the record that during all this time she reposed implicit confidence in and was dependent upon her said son to a great extent, if not entirely, as to all matters pertaining to her welfare. The real property in controversy was the government homestead of the plaintiff; she having, at the solicitation

of her son, filed upon the same in 1897 under the homestead laws of the United States, and he at the same time filing upon an adjoining quarter section. He built a house upon the line between the two quarters, in which they both resided until August, 1903. Defendant, as disclosed by the undisputed evidence, paid all the expenses incident to the filing and final proof upon the land in controversy, and made permanent improvements upon said land, aggregating in value \$650. He also defrayed a portion of her expenses in coming from Norway to this country, and during the time she resided with her son (about seven years) he furnished her with all the necessities of life without compensation, other than the voluntary assistance rendered by her in and about the home, during all of which time she was treated by him with filial affection, and she frequently stated to others, as well as to her son, that in appreciation of what he had done for her she intended that this land should ultimately go to him, as he had helped her to get the land, and had done so much more for her than her other children had done. It is stipulated that at the date of the deed in question the property, exclusive of improvements, was reasonably worth \$1,600, and by the terms of the contract he was to pay her for the land the sum of \$800, represented by eight promissory notes of \$100 each, one payable each year until fully paid, with interest, secured by a mortgage upon said real property. There was a great mass of testimony introduced at the trial in the court below bearing upon the issues as to fraud, undue influence, and failure of consideration; but it would serve no useful purpose to review the same at length in this opinion.

It is sufficient to say that, after a careful consideration of the testimony, we are convinced that the plaintiff has failed to establish facts which would warrant a court of equity in awarding to her the relief which she asks, and we are constrained to believe from the testimony in the case, that, had it not been for the intervention of some of her other children, this action would never have been commenced. It was not until she had met her other sons, and they had caused her to believe that defendant had cheated her in this transaction, that she became dissatisfied and formed the intention of rescinding the contract. The record will be searched in vain for any evidence of actual fraud practiced upon her by defendant in procuring the deed, and while plaintiff may have been influenced to some extent by the defendant in entering into the contract of sale and in executing the deed, we do not think it can properly be held to be such

undue influence as would warrant a court in disturbing the transaction. It is, of course, well settled that courts of equity will carefully scrutinize transactions between persons occupying relations of trust and confidence, and will not hesitate to reach out their strong arm in protection of the weaker against the stronger mind, where an inequitable or unconscionable bargain has been obtained through improper or undue influence; but it is equally well settled that the influence, in order to vitiate a contract, must amount to force or coercion so as to destroy free agency. As stated in *Davis v. Culver*, 13 How. Prac. (N. Y.) 62: "The influence which the law not only refuses to recognize, but repudiates, is undue influence, denominated 'undue' because it is unrighteous, illegal, and designed to perpetrate a wrong. The undue influence exerted to procure the execution of a deed or bequest, or devise by will, must amount to fraud or coercion. The grantor must be overreached and deceived by some false representation or stratagem, or by coercion, physical or moral." The rule is clearly and tersely stated by Mr. Andrews, in his valuable treatise on American Law, as follows: "One party may occupy a position or sustain such a relation to the other as to be able without any actual physical force to so far control the will of the others as to really constitute an overmastery of the mind and render him unable to resist his importunities. The law recognizes that to a certain extent, in the relations of husband and wife, parent and child, attorney and client, nurse with the sick or one in charge of an imbecile the former in each instance has a measurable power over the mind of the latter, and it requires that no undue or excessive importunity shall be made the means of securing a beneficial contract or conveyance; and the excessive exercise of this natural control is called 'undue influence.' Contracts entered into because of it do not bind. * * * Not every pleading, urging, or cajoling will amount to undue influence. The act is so nearly akin to duress that it differs only in the quality of the force. The importunity must amount to coercion, destroying the freedom of mind, so that the act is performed rather from motive of fear or helplessness. To avoid a will or deed it must be shown that the free agency of the party executing the instrument was destroyed. Mere appeals to the affections, or the impulse of gratitude, however importunate, are not sufficient." In *Wallace v. Harris*, 32 Mich. 380, it is said: "The line between due and undue influence, when drawn, must be with full recognition of the liberties due every true owner to obey

the voice of justice, the dictates of friendship, of gratitude, and of benevolence, as well as the claims of kindred, and, when not hindered by personal incapacity or particular regulations, to dispose of his own property according to his own free choice."

Tested by these rules, we unhesitatingly conclude that the evidence in the case at bar is wholly insufficient to warrant a finding of undue influence practiced upon plaintiff by defendant in procuring the execution and delivery of the deed in question. Furthermore, we are convinced that the contract between these parties, instead of being grossly unfair or inequitable, was, on the contrary, just and reasonable, in view of the law and facts. The proof shows that the reasonable value of plaintiff's board during the time she made her home with the defendant was \$2 per week, and the proof also shows that the defendant furnished to her during said time necessary medical attendance and other necessities of life; and, as above stated, he made permanent improvements upon the land to the extent of \$650 in value, and while these were voluntarily furnished, and these improvements voluntarily made by defendant, and, on account of the relations of the parties, he could not legally recover therefor, they were, we think, proper items to be considered by the plaintiff in fixing a consideration for the sale of the land to the defendant. There was a moral, as distinguished from a legal obligation, and, when these matters are considered, it cannot be said that the consideration for this deed was inadequate, or that the contract was an unfair or unconscionable one.

Counsel for respondent cite and rely upon *Brummond v. Krause*, 8 N. D. 573, 80 N. W. 686; and, while we fully indorse what was said by the court in that case, we do not think that the facts in the case at bar are analogous to the facts in said case. It was there held that the relation of trust and confidence existed between the grantors and the grantee, being parents and child, and the contract between such persons will be set aside, where the stronger mind has induced it to be made, unless the bona fides of the transaction is shown. It is conceded by counsel for appellant that this rule is applicable to the case at bar, and hence that the burden is upon the defendant to show the bona fides of the transaction, and that he took no undue advantage of his mother in procuring the deed in question; but he contends, and we think his contention is correct, that he has successfully shown the absolute fairness of the contract, and that he was not guilty of any fraud or undue influence in the

transaction. In *Brummond v. Krause*, *supra*, the only consideration to support the deed of property worth \$1,200 was the unsecured promise of the daughter and son for the payment each year of \$25 cash, and the delivery of 25 bushels of potatoes, 500 pounds of flour, 3 cords of wood, and 1 hog during the life of the grantors, who were very old people, and with a proviso that even this small pittance was to be cut in two at the death of either of the grantors. The decision in that case was placed upon the ground of gross inadequacy of consideration, and also upon the ground of actual fraud in procuring the signatures to the deed. As we have above stated, no such state of facts is disclosed by the record in the case at bar.

In this case there are equities in defendant's favor which should not be overlooked. As stated before, defendant defrayed a portion of plaintiff's expenses in immigrating to this country. He made it possible for her to acquire title to this property from the government, paying all expenses in connection therewith. He supported her and furnished her with the necessities of life during a period of nearly seven years; her other children contributing practically nothing thereto. He has made permanent improvements upon the land at his own expense, aggregating in value \$650; and, if the decision of the trial court is sustained, he in all probability will never receive anything therefor. In view of these facts, which are abundantly supported by the evidence in this record, we are of the opinion that the contract between these parties was fair and equitable and should not be disturbed.

The judgment of the district court will therefore be reversed, and that court directed to enter judgment dismissing the action. The defendant in his answer does not ask for costs, and in view of the relations of the parties and the evident hardship which would result to plaintiff, if she should be required to pay the defendant's costs of this action, we have decided to allow no costs to either party. All concur.

(112 N. W. 70.)

STATE OF NORTH DAKOTA EX, REL. MARY HARVEY V. FRANK DAVIES
AND GEORGE PURVIS, DEFENDANTS, AND FRANK DAVIS, AP-
PELLANT.

Opinion filed April 30, 1907.

Appeal from District Court, Williams County; *Goss, J.*

Action by the state, on the relation of Mary Harvey, against Frank Davies. Judgment for plaintiff, and defendant appeals.

Reversed and dismissed.

Palda & Burke and *W. S. Lauder*, for appellant.

Van R. Brown, for respondent.

PER CURIAM. Following the case of State of North Dakota ex rel. Mary Harvey v. George W. Newton (decided at this term), 16 N. D. 151, 112 N. W. 52, the order of the district court of Williams county is reversed, and the district court directed to dismiss such proceedings.

FISK and MORGAN, JJ., concur. SPALDING, J. dissents.

(112 N. W. 60.)

A. B. FARQUHAR COMPANY, LIMITED, CO-PARTNERSHIP ASSOCIA-
TION, v. W. H. HIGHAM.

Opinion Filed May 4, 1907.

Bills and Notes — Liability of Indorser — Presentment and Notice.

1. An indorsement of a promissory note creates no liability of itself, and the indorser is not liable on the indorsement until presentment to the maker and notice to the indorser of such presentment.

Same.

2. A person not a party to a promissory note, who indorses the same, assumes the obligations of an indorser only, and not those of a guarantor.

Same — Findings.

3. Findings of fact and conclusions of law considered, and held not to sustain the judgment rendered thereon.

Appeal from District Court, Grand Forks County; *Fisk, J.*

Action by A. B. Farquhar Company, Limited, against W. H. Higham. From the judgment, both parties appeal.

Modified and affirmed.

Skulason & Skulason, for plaintiff.

Where defendant, pursuant to contract, endorsed and delivered notes, he became primarily liable at least as guarantor. Rev. Codes, 1899, sections 4625-2636; 7 Cyc. 967, Id. 664.

Under the terms of the contract, a waiver was established. Eaton & Gilbert, Com. Paper 521, 529, 4 Enc. of Law, 453, 457; Randal on Com. Paper, Chap. 38, section 2.

Promise to pay interest waives presentment and notice. Eaton & Gilbert Com. Paper, 471.

W. J. Meyer, for respondent.

An endorser is liable only on the contingency of demand and notice. Rev. Codes 1899, section 6364, ch 110; Rev. Codes 1899, section 66, chapter 100, sections 70, 71, 72; Rev. Codes 1899, sections 89 and 103, chapter 100; Rev. Codes 1899, sections 4861 and 4959; 14 Enc. Pl. & Pr. 548, 550, p. 55. *Nelson v. Grondahl*, 13 N. D. 363, 100 N. W. 1093; *Jagger v. National German American Bank of St. Paul*, 55 N. W. 545.

MORGAN. C. J. This is an appeal from a judgment by both parties. On plaintiff's appeal, the statement of the case was stricken from the files for reasons that are not material now. Defendant has appealed without settling a statement of case. The only question presented is, therefore, whether the findings of fact sustain the judgment. No question is made by the plaintiff that the findings do not sustain the judgment in its favor, and it is not claimed that a different judgment should have been rendered in its favor under the findings. The action was one involving an accounting, and the complaint stated three distinct causes of action. The action was tried to the court, and it was stipulated that separate findings of fact and conclusions of law should be made as to each cause of action, and one judgment entered embodying the amount found due either party in the aggregate under the findings on each of the three causes of action.

The contention of the defendant on his appeal is in reference to the second cause of action. This arose out of a written contract

for the sale of farm machinery. The cause of action, so far as the question involved is concerned, is stated as follows in the complaint: "That under the terms of the aforesaid agreement the defendant endorsed and guaranteed the payment of all promissory notes taken by him for machinery sold under said agreements and delivered the same to plaintiff." The complaint further alleges that the total amount of the notes thus indorsed and guaranteed was, with interest, \$1,975.10. The finding on this cause of action is as follows: "That under the terms of the aforesaid contracts the defendant indorsed all promissory notes taken by him for machinery sold under said agreements, except the Montgomery note, and that it was obligatory upon him under the terms of said contracts to indorse all such notes and to deliver the same to the plaintiff. That among the promissory notes so taken and indorsed by the defendant there are the following bearing interest at the rate of 8 per cent. from maturity. * * * That the amount due on said notes at the date of these findings is the sum of \$1,753.75." And as a conclusion of law the court found "that the plaintiff is entitled to judgment against the defendant in the sum of \$1,753.75, the amount due on notes indorsed by the defendant, as above set forth." The trial court found that the defendant was indebted to the plaintiff in the sum of \$254.10. This sum represented the aggregate of the amounts which the findings showed each party entitled to be credited with, and this balance was reached after charging the defendant with the sum of \$1,753.75 on account of notes found to have been endorsed by the defendant pursuant to the contract. It is claimed that the judgment is not sustained by the findings. This contention is based on the fact that the findings do not show that the notes found to have been indorsed were presented for payment and defendant notified of their non-payment, and do not show that there was a waiver of such presentment for payment and notice.

We think that this contention is well founded. The mere endorsement of these promissory notes created no liability against the defendant. The contract of indorsement has a well-established legal signification. It signifies that the indorser contracts to pay the note at maturity, if duly presented for payment to the maker, and the indorser is thereafter duly notified of such presentment. Daniel. Neg. Instruments, section 666; section 6368, Rev. Codes 1905. In this case the indorsement was not made by the defendant as pay-ee, but as a stranger to the notes as originally drawn. His lia-

bility under the indorsement is the same as though he had been payee and had negotiated the notes by indorsement thereof. Section 6366, Rev. Codes 1905, provides as follows: "When a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery he is liable as indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties." The statute, therefore, fixes the defendant's liability as that of indorser, and there is no foundation for plaintiff's contention that defendant's liability was that of a guarantor, entitling him to no notice of presentment and nonpayment. The findings show that the notes indorsed by defendant were promissory notes. The code defines what a promissory note is, and it is therein declared to be negotiable. Section 6544, Rev. Codes 1905, is as follows: "A promissory note is an instrument negotiable in form whereby the signer promises to pay a specified sum of money." It is therefore shown by the findings that the notes indorsed were negotiable promissory notes. The findings show that plaintiff was credited with the sum total of the notes indorsed by defendant, and defendant was charged with such amounts. The findings do not show that any steps were taken to fasten upon defendant a liability as an indorser. The findings do not, therefore, sustain the judgment that was rendered.

The judgment will be modified by disallowing the credit of \$1,753.75 found due to plaintiff on account of the indorsement of the notes by defendant. The amount allowed plaintiff of \$269.46, upon the liability on the indorsement of the Hans Anderson note, will also be disallowed. The judgment will also be modified by allowing the plaintiff to retain the possession and ownership of all the notes indorsed by the defendant, including the Hans Anderson note, and to have the possession of all securities for said notes. We are asked to modify the judgment by allowing the defendant certain amounts on account of storing certain machinery described in finding No. 8 of the first cause of action. The sums due under said finding seem to have been included and computed by the trial judge in the general balance found due the defendant on the first cause of action. The findings of fact and conclusions of law give the plaintiff the absolute right to the possession of the machinery in defendant's possession. This, we think, precludes us from ordering judgment that defendant retain possession of such property

until storage charges are paid. We cannot say that the judgment entered does not conform to the findings in that respect.

The district court is directed to modify the judgment in the respects indicated in this opinion, and thus modified, the judgment of the district court is affirmed, with the costs in favor of the defendant and appellant.

All concur.

FISK, J., disqualified. TEMPLETON, J., of the first district sitting by request.

(112 N. W. 557.)

M. P. PROPPER V. LOUIS WOHLWEND

Opinion filed June 24, 1907.

Public Lands — Boundaries — Evidence of Monuments Prevails Over Field.—Notes and Plats.

1. In all cases of disputed boundary lines, evidence of the location of the original monuments which were established by the government surveyors control over plats, field notes, and all other evidence as to the proper location of such lines, when the point where such monuments were thus located can be definitely established.

Trial — Directing Verdict — Conflict of Evidence.

2. There was a substantial conflict in the evidence as to whether the original government monument marking the south end of the quarter section line between the lands of plaintiff and defendant was established at the point contended for by the plaintiff or at the point contended for by defendant, and hence it was error to direct a verdict.

Appeal from District Court, Richland County; *Allen, J.*

Action by M. P. Propper against Louis Wohlwend. Verdict for defendant, and, from an order denying his motion for judgment notwithstanding the verdict or for a new trial, plaintiff appeals.

Reversed and new trial ordered.

Purcell & Divet, for appellant.

Where a grant is taken with reference to a plat, it is not competent to show that the boundaries are different from what is shown by the plat. *Beaty v. Robertson*, 30 N. E. 706; *Golterman v. Schier-*

meyer, 19 S. W. 484; Chapman v. Polack, 11 Pac. 764; Davis v. Rainsford, 17 Mass. 207; Cornet v. Dixon, 11 S. W. 660.

Even in case of fraud it can be attacked only by the government. Kirman v. Murphy, 83 Fed. 275; Moore v. Robins, 96 U. S. 530, 24 L. Ed. 848; St. Paul & Pac. Ry. Co. v. Schurmeyer, 74 U. S. 272, 19 L. Ed. 74.

Monuments may be compelled to give way to other descriptions in a deed. Harrel v. Morris, 5 S. W. 625; Murdock v. Chapman, 75 Mass. 156; Buffalo, New York & Erie Ry. v. Stigeler, 61 N. Y. 348; Whitney v. Gray, 31 Am. Dec. 224; Rioux v. Cormier, 44 N. W. 654.

C. E. Wolfe, for respondent.

Grants in patents are not according to plats, but the government survey. McGray v. Monarch Elevator Co., 91 N. W. 457; Arneson v. Spawn, 49 N. W. 1066; Dowdle v. Cornue, 68 N. W. 194.

The directed verdict was proper. Where conceded or undisputed facts necessarily show that the evidence in opposition thereto cannot in the very nature of things be true, no conflict arises. Payne v. Railroad Co., 38 S. W. 308; Southern Ry. Co. v. Smith, 30 C. C. A. 58; Howe v. M., St. P. & S. S. M. Ry. Co., 64 N. W. 102; Medcalf v. St. Paul City Ry. Co., 84 N. W. 633; Badger v. Janesville Cotton Mills, 70 N. W. 687; Groth v. Thomann, 86 N. W. 178; Stafford v. Chippewa Ry. Co., 85 N. W. 1036; Thompson v. Pioneer Press Co., 33 N. W. 856.

FISK, J. This is an appeal from an order of the district court of Richland county denying plaintiff's motion made in the alternative, for judgment notwithstanding the verdict or for a new trial. The action was brought to recover the possession of and to quiet title to a small strip of land claimed to be a portion of the southeast quarter of section 31, township 130 north of range 52 west, also to recover damages for its use and occupation. The real controversy between these parties arises over a dispute as to the correct location of the boundary line between the southeast and the southwest quarters of said section; plaintiff owning the former, and defendant the latter. Plaintiff acquired title to the southeast quarter through various mesne conveyances from the patentee in a patent from the United States, being Exhibit B, dated October 14, 1884, and defendant acquired title to the southwest quarter directly from the govern-

ment of the United States through a patent, Exhibit A, bearing date June 1, 1893. The original government monuments marking the location of the four corners of said section, as well as the quarter section monuments on the north and the east and west lines of the section, are not in dispute, and are concededly correctly located. The whole controversy originated over the location of the quarter section monument on the south line; such monument having been entirely obliterated. Some time prior to the commencement of the action, defendant erected a fence upon what he claims to be the correct line between these quarters, ever since which time he has occupied and used the land on the west side up to such fence; the plaintiff contending that said fence is seven or eight rods too far east. In its final analysis, the principal controversy between these parties grows out of a difference in their respective methods of ascertaining from what point on the south line of said section such quarter line should properly be run. Certified copies of the government plat of this and some of the adjoining lands as returned by the surveyor general and referred to in the respective patents, Exhibits A and B, were introduced in evidence, and also certified copies of the field notes of the original survey. From both plat and the field notes it appears that the south line of this section was supposed to be a full mile in length; but, as a matter of fact, it is about 226 feet less than a mile.

Plaintiff's counsel contend, as we understand them, that the plat returned to the general land office by the surveyor general, and not the original survey or the field notes thereof reported by the surveyor general, control as to the location of the quarter section line in question, and they advance a very ingenious and plausible argument in support of their contention. They argue that the lands embraced in the sections lying adjacent to the township lines on the west of each congressional township, as well as the sections lying south and adjacent to the north lines of such townships, being the west and north tier of sections in each township, are granted by the government with reference to the plats returned by the surveyor general, and not with reference to the monuments established by the surveyor in the field, and that the plat of this section shows that the southeast quarter, being plaintiff's quarter, is a full quarter containing 160 acres. They base this argument upon the premise that the lands embraced in the west and north tiers, being fractional sections, are governed by a different rule than the other lands in the township,

and that proof of the location of original monuments is not admissible to contradict the plats as returned by the surveyor general. In other words, they contend that, in the conveyance of lands lying in fractional sections, the plats prepared in the office of the surveyor general, and returned by him to the land department, are referred to and made a part of the grant from the government, and hence are absolutely controlling as to the description and extent of the lands thus granted. We think counsel have fallen into error in assuming that these lands are granted by the government with reference to the plat. If the plat was made a part of the grant, as they contend, then their argument would have much force; but, as we read and construe section 2396, Rev. St. (U. S. Comp. St. 1901, p. 1473), relating to the disposal of government lands, the corners of sections and quarter sections, when actually established in the field, must in all cases control as to the location of boundaries, except, perhaps, in the case of known errors which have been corrected by the surveyor general, which, however, is not this case; and, as we understand the authorities, no exception to this rule is made in the disposal of lands in what are known as fractional sections, nor do we perceive any reason why a different rule should obtain in such cases, so far as the question here under consideration is concerned. The patent to the southeast quarter, which was introduced in evidence as exhibit B, does not support appellant's contention. It shows that the government granted this land as the southeast quarter of section 31, not as shown by the plat as contended for by appellant, but the patent, after describing the land, contains the following recital: "Containing 160 acres according to the official plat of the survey of said lands, returned to the general land office by the surveyor general. This recital is no part of the granting clause of the instrument, nor does it constitute a warranty that the quarter sold contains 160 acres. It is a mere recital that, according to the plat as returned by the surveyor general, this quarter section of land contains that many acres. Section 2396, Rev. St. U. S., which provides that "each section or subdivision of section, the contents of which have been returned by the surveyor general, shall be held and considered as containing the exact quantity expressed in such return," does not aid appellant's contention, as this language was intended merely to fix the exact quantity of land to be charged for by the government in the disposal thereof. *Heald v. Yumisko*, 7 N. D. 422, 75 N. W. 806.

In support of their contention that the plat controls over all other evidence as to the land granted by the patent, counsel cite and rely upon *Beatty v. Robertson*, 30 N. E. 706, 130 Ind. 589; *Golterman v. Schiermeyer*, 19 S. W. 484, 111 Mo. 404; *Chapman v. Polack*, 11 Pac. 764, 70 Cal. 487; *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566; *Davis v. Rainsford*, 17 Mass. 207; *Cornett v. Dixon* (Ky.), 11 S. W. 660. We have carefully examined these authorities and fail to see wherein they sustain appellant's contention. *Beatty v. Robertson* simply holds that, where there is a difference between the field notes of the original survey of public lands and the plat, the latter must control, since it represents the lines and corners as fixed by the surveyor general and by which the land was sold. There was no attempt to prove the actual location of the original corner post or mound as established by the deputy surveyor. The same is true as to *Golterman v. Schiermeyer*, *supra*. In that case the facts show that the quarter corner on the west section line, which was in dispute, was blank, and, this being true, the court held that the surveyor general's location of such corner on the plat by which the land was sold must govern. The court expressly recognized the general rule by saying: "The monuments, set by the deputy United States surveyor for the west section corners must control as to the proper location of those corners. The question where they were located, if destroyed, is one of fact, and not of law, for the jury to determine under all the evidence." In *Chapman v. Polack*, *supra*, it was said: "The plat resorted to for ascertaining the position of the quarter section stake on the east line of the section was the true method of determining the point, in cases where the position of the quarter section lines are not laid down and their locus fixed; but when, as in this case, the position of the lines has been fixed, and rights have vested with reference to it as established, the position for the quarter section posts is also determined as being at the end of the established line." In *Davis v. Rainsford*, *supra*, decided by the Supreme Court of Massachusetts in 1821, the general rule is expressly recognized, but on account of the particular facts in that case, the court made an exception. It is stated in the syllabus: "The general rule that known monuments referred to in the description of land in a conveyance are to govern in the construction, rather than the courses, distances, or computed contents mentioned in such description, is subject to exceptions, as where an adherence to the rule would be plainly absurd." In *Cornett v. Dixon*, *supra*, also relied

upon by appellant's counsel, it was held merely that where a patent is made in accordance with a recorded plat and survey, contradictory statements in the surveyor's minutes, as to the length of one of the lines, are insufficient to prove that the statements as to such line in the plat and survey are erroneous. The question as to the controlling effect of original monuments established in the field by government surveyors was not involved in these cases.

The authorities seem to be unanimous in holding to the doctrine adhered to by this court in *Radford v. Johnson*, 8 N. D. 182, 77 N. W. 601, and, as before stated, no distinction seems to have been made in the rule with reference to the location of lost corners between fractional sections and sections not fractional. Where such original monuments can be located definitely, they control absolutely over all other evidence, including plats and field notes. *McGray v. Monarch El. Co.*, 16 S. D. 109, 91 N. W. 457; *Arneson v. Spawn*, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783; *Dowdle v. Cornue*, 9 S. D. 126, 68 N. W. 194; *Tyler v. Haggart* (S. D.) 102 N. W. 682; *Thayer v. Spokane Co.*, 36 Wash. 63, 78 Pac. 200; *Unzelmann v. Shelton* (S. D.) 103 N. W. 646; *Washington Rock Co. v. Young*, 80 Pac. 382, 29 Utah 108, 110 Am. St. Rep. 666; *Kleven v. Gunderson*, 104 N. W. 4, 95 Minn. 246; *Stonewall Phosphate Co. v. Peyton et al.*, 39 Fla. 726, 23 South 440; *Wheeler v. Benjamin*, 136 Cal. 51, 68 Pac. 313. The opinion in *Stonewall Phos. Co. v. Peyton*, supra, contains a very clear statement of the rule as we understand it to be, and we quote therefrom as follows: "The grant of all lands presupposes an actual survey of them, and the patent must be considered as conveying the land as actually surveyed. Therefore, when it can be shown that a line was actually run, or division made, by the surveyor in surveying the land, and that such line or division was marked by corners or natural objects, and such survey is established, the grantee in a patent will take according to such actual survey, notwithstanding any mistake in description as to courses and distances contained therein, or the quantity of land stated to be conveyed. It is a familiar rule that courses and distances must give way to natural as well as artificial objects, when they are inconsistent. * * * The quantity of land contained in a patent may be considered as ascertaining the extent of the grant in area, but cannot control the actual boundary limits of the land as located on the ground by the original government survey. This is in accord with the letter and spirit of section 2396, c. 9, Rev.

St. U. S. This section directs the subdivision of the public lands into quarter sections, and that corners located and marked in the field shall be established as the proper corners of sections and quarter sections, and that corners of half and quarter sections not so marked shall be placed as nearly as possible equidistant from the two corners standing on the same line. The second paragraph of the section provides that the boundary lines actually run and marked in the field shall be established as the proper boundary lines of the sections or subdivisions. According to all the authorities, the boundaries as actually located by the original survey, must, when established, control in ascertaining the quantity of land contained in a patent, and the same is true of a deed unless a clear intent to the contrary is expressed therein. The position taken by counsel for appellees, that the action of the local land officers in dividing the section equally, or practically so, will control the description of the land as to section and quarter-quarter section according to the original survey, is not correct. * * * As stated above, the grant is conclusively presumed to be made upon an actual field survey of the land, and the reference in the patent to the section, township, and range must be taken as referring absolutely to the actual ground survey of the land as originally made, and upon which the grant was unquestionably made. The surveyors were the officers whose duty it was to subdivide the township into sections and quarter-quarter sections, and mark the boundary thereof, and, this having been done, the local land officers granted them, and in accordance with such survey. They had no authority to do otherwise."

See, also, *Ogilvie v. Copeland*, 145 Ill. 98, 33 N. E. 1085. We quote from page 111 of 145 Ill., page 1087 of 33 N. E., as follows: "It is true, it is required by the United States statutes that 'the boundary lines actually run and marked in the surveys, returned by the surveyor general, shall be established as the proper boundary lines of the sections or subdivisions, for which they were intended; and the length of such lines, as returned, shall be held and considered as the true length thereof.' So, also, it requires 'that the corners marked in the surveys returned by the surveyor general, shall be established as the proper corners of sections or subdivisions of sections, which they were intended to designate.' Section 2396, Rev. St. U. S. And when the measurement of the line as returned does not agree with the distance between the corners thus establish-

ed, and between which it is assumed to be the measurement, it must be disregarded. Monuments control as to courses and distances."

Several of the foregoing authorities, it will be noticed, involved lands in what are known as fractional sections. But this fact was not considered important. We therefore conclude that the trial court did not err in receiving evidence tending to show the location of the original quarter-section post on the south line of said section at a point different from that shown by the plat; nor did it err in denying plaintiff's motion for a directed verdict and for judgment notwithstanding the verdict.

At the close of the testimony, the court directed a verdict in defendant's favor, and this is assigned as error, as is also the court's ruling in denying a motion made by plaintiff, in the alternative, for judgment notwithstanding the verdict or for a new trial. These assignments are predicated upon the theory that there was a sufficient conflict in the testimony as to the location of this quarter section monument by the deputy surveyor to require a submission of the question to the jury. In this we think counsel's contention is clearly correct. We will not detail at length the testimony produced by plaintiff tending to establish the location of such monument at the point contended for by him, but suffice it to say that, from a careful reading of the record before us, we are convinced that there was a substantial conflict in the testimony upon this point, and hence that the court erred in making the rulings complained of. We do not think the case comes within the rule invoked by respondent's counsel to the effect that known physical facts must control over all other testimony. It is undoubtedly true that no amount of evidence will suffice to raise a question for the jury, when such evidence is opposed to known physical facts or phenomena; but we fail to see how this rule is applicable to the facts before us. The testimony in behalf of the plaintiff tended to establish the fact that the quarter post in question was originally located at a point about 40 chains west of the southeast corner of the section, while that of the defendant tended to show that it was located at a point 40 chains west of the southwest corner of said section, and it was for the jury to say, under all the evidence, what the fact was. See *Black v. Walker*, 7 N. D. 414, 75 N. W. 787, in which a very similar question was involved, and where the same conclusion was reached. In that case there was a dispute as to a township boundary line, and, after referring to the evidence the court said: "Appellants insist

that, as no witness went upon the stand to contradict either Mr. Walker or Mr. Kenyon, and as they each positively swore that the original corner was at point B, any finding of the jury to the contrary must be set aside as without support in the testimony. But that is by no means true. The most direct and positive testimony may be completely demolished by circumstantial evidence, or overcome in the minds of a jury or the mind of a court by the establishment of other facts inconsistent therewith. This case is a good illustration. If the jury believed that it was only 320 rods from the southeast corner of section 36 to point C (and a number of witnesses so testify, and no one assumes to contradict it), and if the jury also believed that the original section corner between the said sections 1, 2, 35 and 36 was located 320 rods west from the southeast corner of 26 (and the original field notes so declare, and no one assumed to dispute the recital), then the jury was bound to believe that the original stake had been moved after the corner had been established, * * * or that the witnesses mistook something else for the original stake and mound. The two states of facts could not coexist. There was strong evidence of the existence of each. It was the province of the jury to say which did in fact exist, and their finding cannot be disturbed."

For the errors in directing a verdict and in denying plaintiff's motion for a new trial, the order appealed from must be reversed, and a new trial ordered. All concur.

(112 N. W. 967.)

COUNTY OF GRAND FORKS V. PAULINA FREDERICK.

Opinion filed June 17th, 1907.

Taxation — Assessment — Indefinite Description of Land.

1. A description of land in an assessment roll must be so definite and certain as to afford the owner the means of identification of the land is his land, before the assessment is a valid one. The description must also be definite in order to inform intending purchasers what lands are offered for sale.

Same.

2. The fact that the owner is not misled and is aware that it is his lot or land that is intended to be assessed, and that he owns no other real estate in the block, is immaterial, and does not have the effect of validating a void assessment.

Same — Verification of Assessment Roll.

3. The absence of a verification from the assessment roll is a defense to the proceeding for the collection of a tax under the provisions of chapter 161, p. 213, Laws 1903.

Same — Constitutional Law — Curative Acts.

4. The provisions of chapter 166, p. 232, Laws 1903, which legalizes only irregularities in assessing or levying taxes upon real estate, do not apply to void assessments by reason of failure to describe the land definitely.

Same — Indefinite Description.

5. A description in an assessment roll of a part of a lot as the "N. 23x200 ft.," the said lot being about 600 feet long and extending in a northeasterly direction, is void for indefiniteness, although the owner of the lot is correctly named in the assessment roll.

Appeal — Questions Certified — Evidence Preserved.

6. Questions certified to the Supreme Court by the district court for review, pursuant to section 10 of said chapter 161, p. 218, Laws 1903, should be based upon a statement of the facts established on the trial, and the evidence should not be returned to this court.

Same.

7. Upon a review of a judgment of the district court under said section, questions of law, and not questions of fact, are reviewable.

Appeal from District Court, Grand Forks County; *Fisk, J.*

Action by the county of Grand Forks against E. B. Fredericks and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

J. B. Wineman, state's attorney, and *B. G. Skulason*, for appellant

The symbols "N" for north and "S" for south, etc., are sufficient in describing land for taxation. *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322; *Stoddard v. Lyon*, 99 N. W. 1116; *Chestnut v. Harris*, 43 S. W. 977; *Auditor General v. Sparrow*, 74 N. W. 881; *Taylor v. Wright*, 13 N. E. 529.

A description is sufficient if it affords notice and protects owner's rights. *Kershaw v. Jansen*, 68 N. W. 616; *Colcord v. Alexander*, 67 Ill. 581; *Stevens v. Wait*, 112 Ill. 544; *Taylor v. Wright*, *supra*.

If it enables a surveyor to identify the land. *Law v. People*, 80 Ill. 268; *Fowler v. People*, 93 Ill. 116; *People v. Stahl*, 101 Ill. 346; *Cairo V. & C. Ry. Co. v. Mathews*, 38 N. E. 623; *Koehling*

v. People, 63 N. E. 735; Harts v. Mackinack Island, 92 N. W. 351; Wash. T. & L. Co. v. Smith, 76 Pac. 267; Douglas v. Bvers, 76 Pac. 432.

It is competent for legislature to pass curative acts, like Ch. 166, Laws of 1903. Wells County v. McHenry County, 7 N. D. 246, 74 N. W. 241; State Finance Co. v. Mather, 15 N. D. 386; 109 N. W. 350; Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227; Black on Tax Title, 482, 483 and 487; Cooley on Taxation (2d Ed.), p. 297.

W. J. Mayer, for respondent.

Failure to verify assessment roll is fatal to tax. Silsbee v. Stockle, 7 N. W. 160; Clarke v. Crain, 76 Am. Dec. 775; Deckison v. Reynolds, 12 N. W. 25; Lee v. Crawford, 88 N. W. 97; Eaton v. Bennett, 87 N. W. 188.

Not to be urged in equitable action. Farrington v. New England Investment Co., 45 N. W. 191; Douglas v. City of Fargo, 13 N. D. 467, 101 N. W. 919.

May be validated by a curative act. State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350; Beggs v. Payne, 15 N. D. 436, 109 N. W. 322.

Where there is no assessment or no levy, action cannot be barred by a limitation act without adverse possession. Nind v. Myers, 15 N. D. 400, 109 N. W. 335; State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350; Black on Tax Titles, Sec. 89, Sec. 387.

MORGAN, C. J. This action is brought by the county of Grand Forks against the defendant, under the provisions of chapter 161, p. 213, of the Laws of 1903, an act entitled as follows: "An act to enable boards of county commissioners to institute proceedings to enforce payment of taxes on real property sold to the state or county for taxes and remaining unredeemed for more than three years." The county claims that the defendant has not paid any taxes on the land described in the tax proceedings during the years 1890 to 1903 inclusive, excepting in the year 1892. The defendant answered and alleged several grounds upon which she claimed that she was not liable for the payment of the taxes upon such land. Among the defenses so alleged is one that the land or lot described was never assessed, for the reason that it was not described in the assessment roll. The trial court made findings of fact and conclu-

sions of law, sustaining the defendant's contentions, and dismissed the proceedings against the county of Grand Forks. After the rendition of judgment, the trial court certified certain questions for a decision by this court, under the provisions of section 10 of said act, which reads as follows, so far as it bears on the question of making a certificate by the trial court: "The judgment which the court shall render shall be final, except that upon application of the county, or other party against whom the court shall have decided the point raised by any defense or objection, the court may, if in its opinion the point is of great public importance, or likely to arise frequently, make brief statement of the facts established, bearing on the point, and of its decision and forthwith transmit the same to the clerk of the Supreme Court, who shall enter the same as a cause pending in such court, and place the same on the term calendar of such court for the term then in session, or for the first term thereafter."

The respondent makes a motion in this court to strike out the evidence and certain other parts of the record, as not properly in the record under proceedings for a review by this court of the decision of the trial court in such cases. In this case, all the evidence taken upon the trial has been returned to this court, together with the findings of fact and conclusions of law of the trial court. Under the section just quoted, it is not proper practice to certify the evidence on which the decision of the trial court was based to this court. The trial court makes "a brief statement of facts established * * * and its decision." From this reading, it is clear that the evidence has no place in the record to be transmitted from the trial court. This court is to reach its conclusions upon the facts established as certified to this court. In other words, no questions of fact are reviewable by this court under proceedings based on this section. This court passes only upon questions of law. In this case, however, the trial court certified its findings of fact and conclusions of law, and these may be taken as statements of facts established by the trial court. However, proper practice would require that the trial court make a statement of the facts established in connection with the questions certified, and it is unnecessary, or would be unnecessary in many cases, to return all of the findings of fact. This section contemplates a summary proceeding in the Supreme Court to determine the questions certified, and does not contemplate a return to this court of all the evidence or all the proceedings. The motion will therefore be granted to strike from the record the evidence

certified to this court; but the case will be reviewed on the findings of fact, which we will consider in this case as equivalent to the making of a brief statement of the facts established in the court below.

This law is similar to section 1589, Rev. St. Minn. 1894, now repealed. The construction given by the Supreme Court of that state to that act is that ultimate facts and the court's conclusions only are properly certified to the Supreme Court under that act. In *re Cloquet Lumber Co.*, 61 Minn. 234, 63 N. W. 628; *Morrison Co. v. St. Paul, etc., Ry. Co.*, 42 Minn. 451, 44 N. W. 982; *County of Ramsey v. Railway Co.*, 33 Minn. 537, 24 N. W. 313. A statute similar to this was before this court in *Wells county v. E. H. McHenry et al.*, 7 N. D. 246, 74 N. W. 241, and in *Emmons County v. C. C. Bennett*, 9 N. D. 131, 81 N. W. 22; but no question of practice was therein involved. It is claimed that this case is not such a case as is contemplated to be reviewed by this court under said section. That section specifies that the questions may be certified, "if, in the opinion of the trial court, the point is of great public importance or likely to arise frequently." As this point was not raised or argued, we shall not determine the question suggested. It is clear, however, that this section is not meant to give the right of review upon a certificate of all questions that relate only to the determination of private rights. It may be that the certificate of the judge that the question is deemed of great public importance, and that it is likely to arise frequently, would be considered as a final determination of the importance of the question. Whether such certificate would be binding upon this court in all cases we do not determine. However, it is clearly the intent of the law that, in certifying cases to this court, the trial court should act with judicial discretion, and only certify such questions as are deemed of great public importance, or are likely to arise frequently.

The principal question involved in the merits is as to whether the tract land involved in the taxation proceedings was properly described in the assessment roll. The tract attempted to be assessed was composed of a part of three lots in block 25, original townsite of the city of Grand Forks. Practically the same point is raised against the validity of the assessment as to the description of the three lots. The part of lot 2 which was attempted to be assessed is accurately described as follows: "Part of lot 2, beginning at a point in block 25, original townsite of Grand Forks, N. D., and on the line of Third street, distant 73 feet from the intersection of the

southerly line of De Mers avenue and the easterly line of Third street; thence northeasterly toward the Red River of the North on a line parallel with De Mers avenue, 200 feet; thence northwesterly and along line common to lots 1 and 2, 200 feet, to the line of Third street; thence southeasterly and on the line of Third street, 23 feet, to the place of beginning—being a strip of land 23 feet wide and 200 feet in depth of lot 2, block 25, original townsite of Grand Forks, fronting on Third street." This lot was described in the assessment roll for the year 1890 as follows:

Owner	Description	Lot	Block
E. B. Frederick	Town N. 23x200 ft. deep	2

The number of the block in this description was not given, in the description immediately above this one, the number "25" was given as the number of the block. There were no ditto marks given in this description to indicate that block 25 was intended to be described. The effect of the omission of the number of the block need not be determined.

Whether this is such a description as will sustain an assessment is the paramount question certified to this court by the district court. The question certified is as follows: "(1) Sufficiency of the descriptions: Are the descriptions, or any of them, of the lands sought to be charged with the above taxes, sufficient to sustain these proceedings?" If the description is sustained as sufficient other questions that have been certified will require an answer. It is established by decisions of this court, almost from its organization, that, before there can be a valid tax, there must be a description sufficiently accurate and definite to enable the owner to identify it therefrom as his property. The description as given in the assessment roll is to be used in all the subsequent tax proceedings. There is no provision for changing the description thereafter in order to correct it or make it more certain, and extrinsic evidence is not admissible to show what is meant to be described or what the words or figures used mean. A sufficient description is necessary, not alone for the benefit of the owner. The land assessed, if thereafter sold, is transferred to a purchaser. The necessity of a sufficient description is further emphasized by this fact. The description

becomes the basis of future titles. This description is not definite. It is impossible to tell from it what north part of lot 2 of block 25 it describes. Lot 2 is about 570 feet in depth. The north 23 feet by 200 feet does not locate any particular part of lot 2. The same descriptions would be quite as applicable to other parts of the north side of lot 2. The tract owned by the defendant was an oblong tract in the northwest corner of that lot. From this description a surveyor could not locate the tract. No point is given as the starting point for the dimensions 23 by 200 feet. The act under which these proceedings were brought provides that no taxes shall be declared invalid unless it shall be made to appear, among other things, that the description or valuation of the property cannot be definitely ascertained from the assessment roll. The description was clearly so indefinite that we have no hesitation in declaring the assessment void. The following decisions of our own court amply sustain our conclusion: *Power v. Larrabee*, 2 N. D. 141, 49 N. W. 724; *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511; *Beggs v. Paine* (N. D.), 109 N. W. 322; *State Finance Co. v. Mather* (N. D.), 109 N. W. 350; *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117; *Nind v. Myers* (N. D.), 109 N. W. 335; *Wells Co. v. McHenry*, 7 N. D. 246, 74 N. W. 241. Question No. 1 in the certificate is therefore answered in the negative.

The fact that the owner's name was correctly given, and that he was not misled by the description, and knew that his land was intended to be assessed, is not material, and does not relieve the authorities from proceeding regularly in assessment matters. *Sheets v. Paine* and *Power v. Bowdle*, *supra*.

The effect of the curative provisions of chapter 166, p. 232, Laws 1903, upon the tax in question, is also certified for a decision. The language of that act in that regard is as follows: "No tax shall be set aside for any defect or irregularity in form or illegality in assessing, laying or levying such tax, if the person against whom, or the property upon which such tax is levied, assessed or laid, is in fact liable to taxation unless it be made to appear to the court that such irregularity resulted to the prejudice of the party objecting." The reasonable construction of that act is that irregularities only are cured and rendered immaterial. Omissions going to the groundwork of the tax such as an assessment are not included within the provisions of the act. Without this essential there is no tax. The want

of a sufficient description was not rendered immaterial or cured by the terms of that act. This defect is not a mere irregularity, but goes to the groundwork of the tax. The land is not assessed unless described with sufficient accuracy for identification. *Wells County v. McHenry*, supra; *Nind v. Myers*, supra; *State Finance Co. v. Mather*, supra; *State Finance Co. v. Myers et al.* (decided at this term), 112 N. W. 76; *Lee v. Crawford*, 10 N. D. 482, 88 N. W. 97. The answer to this question will be that the act of 1903 does not cure void assessments, but that it refers only to irregularities, and not to matters of jurisdiction to the tax.

Another question that is certified is as to the effect of a failure to verify the assessment roll, when such failure is urged as a defense to the collection of the tax under said act of 1903. Legal defenses are permitted to be pleaded to the tax under that act. The language as to what defenses may be interposed in the answer is as follows: "Setting forth the defense or objections to the tax or penalty * *

* which need not be in any particular form, but shall clearly refer to the piece or parcel of land intended and shall clearly set forth in ordinary and concise language the facts constituting the defense or objections to such taxes or defenses." The effect of the absence of a verification of the assessment roll is well established by decisions of this court. The rule established is that the absence of a verification is fatal to the tax in a law action, and not fatal in equitable actions. *Farrington v. N. E. Inv. Co.*, 1 N. D. 102, 45 N. W. 191; *Douglas v. City of Fargo*, 13 N. D. 467, 101 N. W. 919; *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188; *Lee v. Crawford*, 10 N. D. 482, 88 N. W. 97. The answer to this question is that the absence of a verification to an assessment roll is fatal to the tax in proceedings brought under the act in question, which permits defenses legal in their character to taxes attempted to be collected.

Other questions are certified bearing upon the judgment to be entered, and what penalties and interest should be charged, and the effect of a prior adjudication against the validity of some of these same taxes. The questions answered are decisive of the case and of the judgment to be entered. The appellant does not claim that these other questions become material, unless a reversal is to be ordered. The other questions are of no general importance. Hence an answer to them is unnecessary.

Judgment affirmed. All concur.

FISK, J., disqualified. BURKE, judge of Fifth district, sitting by request.

(112 N. W. 839.)

O. M. OMLIE V. ANN O'TOOLE ET AL.

Opinion filed June 19, 1907.

Pleading — Complaint Cured by Answer.

1. When essential averments are omitted from the complaint and supplied by the answer, such defects in the complaint are cured.

Appeal — Abuse of Discretion as to Amendment.

2. Action of trial court in amending complaint after evidence is all introduced, to make it conform to the proof, when such amendment makes no substantial change in the claim, will not be reviewed on appeal, unless an abuse of discretion is apparent. *Held*, under the circumstances surrounding the making of such amendment in this case, no abuse of discretion appears.

Deed as Mortgage — Parol Evidence.

3. An instrument in form a deed may be proved by oral testimony to be a mortgage between the parties and all others with knowledge of its purpose.

Limitation of Actions — Effect of Payment on Security.

4. Payment on the debt, or other acts which interrupt the running of the statute of limitations on the debt, also prevent the statute from running on the security.

Same — Mortgage — Homestead — Payment by Husband.

5. The assent of the wife is not necessary to an extension of the time of payment of a debt secured by mortgage on the homestead by the husband; and without her assent, the husband can prevent the statute from running on the mortgage.

Same — Wife Joining in Mortgage on Homestead Not a Surety.

6. A wife who joins husband in the execution of a mortgage on the homestead, given to secure his debt, does not thereby become a surety, and is not entitled to notice of an extension of the time for payment of the mortgage debt.

Witness — Transactions With Decedent.

7. In an action to foreclose a deed given as security for debt, wherein the grantee, witness, and the heirs at law of the grantor, since deceased, are adverse parties, testimony of the grantee that he paid interest on a prior mortgage and taxes on the mortgaged premises to protect the lien of his deed does not come within the statute disqualifying a party to an action from testifying to transactions had with a person since deceased.

Mortgage — Mortgagee's Payments to Protect Lien.

8. The grantee in an instrument in form a deed, but given to secure a debt, can pay interest on a prior mortgage and taxes necessary to protect his lien and the lien of his deed will attach to such payments.

Same — Evidence.

9. Certain evidence examined, and *held* sufficient to identify certain notes as given for same debt secured by lien.

Appeal from District Court, Walsh County; *Goss*, J.

Action by O. H. Omlie against Ann O'Toole and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Geo. A. Bangs, for appellants.

Under device of conforming pleadings to proof, new cause of action cannot be introduced. *Freeman v. Grant*, 132 N. Y. 22; *Arnold v. Angel*, 62 N. Y. 508; *McMichael v. Kilmer*, 76 N. Y. 36; *Barnes v. Quigley*, 59 N. Y. 265; *Allen v. Brooks*, 50 N. W. 253; *Lewark v. Carter*, 20 N. E. 119; 1 Enc. Pl. & Pr. 583; *Southwich v. First National Bank*, 84 N. Y. 420; *Mares v. Warrington*, 8 N. D. 329, 79 N. W. 441; 1 Enc. Pl. & Pr. 548, 549; *Reeder v. Sayre*, 70 N. Y. 190; *Button v. Towboat Line*, 40 Hun. 422; *Davis v. Iowa State Ins. Co.*, 25 N. W. 745; *Burns v. Schreiber*, 51 N. W. 120.

The husband, without his wife's consent, cannot mortgage the homestead, extend or enlarge terms of mortgage thereon, prolong the statute of limitations upon it, or otherwise change its legal effect. *Dunn v. Buckley*, 46 Wis. 190, 14 N. W. 67; *Jenkins v. Simmons*, 37 Kan. 496, 15 Pac. 522; *Barber v. Babel*, 36 Cal. 11; *Spencer v. Fredendall*, 15 Wis. 666; *Campbell v. Babcock*, 27 Wis. 512; *Hardman v. Portsmouth Bank*, 61 Pac. 984; *Cumps v. Koyo*, 80 N. W. 937; *Wood v. Goodfellow*, 43 Cal. 185; *Waples on Homesteads and Exemptions*, p. 426.

A mortgage can be renewed or extended only by writing, with all the formalities of a grant. *People's State Bank of Lakota v. Francis*, 8 N. D. 369, 79 N. W. 853; *Stoddart v. Hart*, 23 N. Y. 557; *London & San Francisco Bank v. Bandman*, 52 Pac. 583; *Wells v. Harter*, 56 Cal. 342.

A lien limited to a particular debt cannot be extended to cover another. *Locke v. Hubbard*, 69 N. W. 588; *Nevan v. Roup*, 8 Ia. 207; *Hathaway v. Fall River Bank*, 131 Mass. 14; *Jarvis v. Rogers*, 15 Mass. 3189; *Jones on Liens*, section 15; section 4686 Rev. Codes of 1899.

A mortgage is a mere incident to a debt and is extinguished by a payment thereof. Sections 4694 and 4707 Rev. Codes (N. D.) 1899; *McMillen v. Richards*, 9 Cal. 365; *Goodnow v. Ewer*, 16 Cal. 461; *Skinner v. Buck*, 29 Cal. 253; *Drake v. Root*, 2 Colo. 685.

Even if it is in the form of a deed. 20 Enc. of Law (2nd Ed.) 981; *Anderson v. Neff*, 11 S. & R. 222; *Wentz v. DeHaven*, 1 S. & R. 311; *Monson v. Monson*, 30 Conn. 425; *Nichols v. Cole*, 3 Head, 92; *Grover v. Flyre*, 5 Allen, 543; *Merrill v. Chase*, 3 Allen, 339.

Amount paid for taxes cannot be secured by the quit claim deed. 24 Enc. Law (2d Ed.) 190; *Briley v. Cherry*, 2 Div. L. 2; 18 Am. Dec. 561; *Costello v. Burks*, 19 N. W. 247; *Wilson v. Campbell*, 33 Ala. 249; *Snodgrass v. Bank*, 25 Ala. 161, 60 Am. Dec. 505.

Plaintiff suing an administrator, cannot prove decedent's signature by his own testimony. *Regan et al., Executor, v. Jones*, 14 N. D. 591, 105 N. W. 613; *Holiday v. Kinne*, 22 Fla. 153; *Jones on Evidence*, section 793; *In re. Toomey Estate*, 150 Pa. St. 535; *Holcomb v. Holcomb*, 95 N. Y. 325; *Cunningham's Adm'r v. Speagle*, 50 S. W. 244; *Montague v. Thompson*, 91 Tenn. 168; *Harte v. Reichenberg*, 92 N. W. 987; *Gist v. Gaus*, 30 Ark. 285; *Robinson v. Dugan*, 35 Pac. 902; *Quarrier's Arm's v. Quarrier's Heirs*, 15 S. E. 154; *Jones on Evidence*, 793.

A person interested in the event of an action cannot testify as to transactions with deceased. *U. S. Loan Co. v. Bitzer*, 78 S. W. 183; *Board of Com. Louisville v. Marret*, 80 S. W. 166; *McCowan v. Davenport*, 47 S. E. 27; *Garritson v. Kinkead*, 92 N. W. 55, *Pym v. Pym*, 96 N. W. 429; *Anderson v. Laugen*, 99 N. W. 437; *Jones v. Riley*, 66 N. E. 649; *Patton v. Fox*, 69 S. W. 287; *Swivel v. Hougan*, 42 S. E. 151.

J. H. Frame, Jeff M. Myers and J. H. Bosard, for respondent.

If essential averments are omitted from complaint, but supplied by the answer, defect in complaint is cured. *Bennett v. Phelps*, 12 Minn. 326; *Shartle v. Minneapolis*, 17 Minn. 308; *Rollins v. St.*

Paul Lbr. Co., 21 Minn. 5; Warner v. Lockerby, 8 N. W. 879; Irwin v. Paulett, 1 Kan. 418; Bierer v. Fretz, 32 Id. 329; Riggs v. Maltby, 59 Ky. 88; Miller v. White, 4 Hun. 62; Erwin v. Schaffer, 72 Am. Dec. 613.

Power to amend should be liberally exercised. Anderson v. First National Bank, 5 N. D. 80, 64 N. W. 114; Martin v. Luger Furn. Co., 8 N. D. 220, 77 N. W. 1003; Lyons v. R. L. & S. Bk., 12 S. E. 882; Waterbury v. Fisher, 38 Pac. 846; Patterson v. Johnson, 73 N. E. 761; Stephenson v. Stephenson, 72 S. W. 742; Freeman v. Pullen, 31 So. 451; Brainard v. Burk, 148 U. S. 99, 46 L. Ed. 449; Tennant v. Dunlop, 33 S. E. 620; Harrison v. Yerby, 14 So. 321; Milner v. Stanford, 14 So. 644; Fite v. Kennemer, 7 So. 920; Moore v. Alvis, 54 Ala. 356.

An instrument in form a deed may be a mortgage by oral defeasance. Patnode v. Deschenes, 106 N. W. 573, 15 N. D. 100; O'Toole v. Omlie, 8 N. D. 444, 79 N. W. 849.

Extension of debt does not extend the mortgage securing it, so as to release a surety. People's State Bank of Lakota v. Francis, 8 N. D. 369, 79 N. W. 853; Roberts v. Roberts, 10 N. D. 531, 88 N. W. 289; Patnode v. Deschenes, *supra*.

SPALDING, J. The complaint in this action alleges that prior to December 5, 1885, one Thomas O'Toole, since deceased, was the owner of the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 21 and the W $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 22, in township 159 N., of range 55 W., in Pembina county, N. D., and that on that day he and Ann O'Toole, one of the defendants herein, his wife, conveyed the same to plaintiff by warranty deed, which deed was recorded in the office of the register of deeds in Pembina county on the 8th day of February, 1886, but that said deed was given only for security; that on the 13th day of January, 1887, O'Toole and his wife executed and delivered to plaintiff another deed of the same premises, which deed was duly recorded on the 4th day of February, 1887; that at the time of the execution and delivery of the said deeds said O'Tooles were living upon and occupying said described premises, and continued to do so until the death of Thomas O'Toole; that Thomas O'Toole was indebted to the plaintiff in a large amount, and on or about the 20th day of November, 1894, he had a settlement with plaintiff of all matters relating to said indebtedness, and entered into a contract in writing, whereby the plaintiff agreed to reconvey said land to said O'Toole upon payment by O'Toole to plaintiff of \$2,800, the amount

then due from O'Toole to plaintiff, and certain promissory notes which are set out in the complaint were given, and that in said contract O'Toole promised and agreed to pay all taxes that should accrue against said land after the year 1894, and that the title thereto and to all crops to be grown thereon should be and remain in the plaintiff until all the conditions of said contract should be fully performed by said O'Toole; that no part of said indebtedness has been paid, except \$162, which was paid on the 1st day of November, 1895, and that O'Toole has neglected and refused to pay the taxes on said premises, and that plaintiff has paid the same, specifying dates of payment and the amount paid; that no action at law or other proceeding has been had to collect the amount due on said contract except certain unavailing attempts to seize grain; and that no action is now pending for the recovery of the money secured thereby, or any part thereof.

Judgment is asked that the amount due from said O'Toole to plaintiff is \$2,800 with taxes and interest paid, with interest thereon, less the payment made of \$162, and that the amount found to be due is a lien upon the real property described or any such part thereof as may be sufficient to pay the amount so adjudged to be due and the costs of sale and action, and that there be paid out of the proceeds thereof the costs of sale and action and the amount of such judgment, or any such part thereof as the proceeds of such sale will pay, and for execution for the balance, and the usual other relief asked in foreclosure proceedings. To this complaint defendants answered, denying each and every part thereof, except as specially admitted and alleged that Thomas O'Toole, deceased, and the defendant, Ann O'Toole, were husband and wife for more than 20 years before the death of Thomas O'Toole, and during all such time lived together as such; that in 1882 Thomas O'Toole filed on the land described in the complaint under the homestead laws of the United States, and that they established their residence thereon and have resided thereon with their family ever since, and that it is their homestead; that on or about the 5th day of December, 1885, the defendant Ann O'Toole executed and delivered to plaintiff an instrument, in form a warranty deed, but in fact a mortgage of said described premises, to secure the balance of an indebtedness remaining unpaid, created by Thomas O'Toole to plaintiff, on no part of which indebtedness Ann O'Toole was liable; that about the 1st day of February, 1887, she and Thomas O'Toole executed and de-

livered to plaintiff an instrument, in form a quitclaim deed, which purported to convey said premises to plaintiff, but which in fact was given as security for an indebtedness theretofore created, and then existing from said Thomas O'Toole to plaintiff, for no part of which said Ann O'Toole was responsible or liable, and that neither of said deeds contained any agreement, covenant, or obligation on the part of said Ann to pay or become responsible or liable for the indebtedness of said Thomas, for the security of which said deeds were executed. The answer also alleges that said deeds did not state in full the contract entered into between said Thomas and the plaintiff, but that there was a verbal defeasance entered into as a part of such transaction between said Thomas and the plaintiff, and that in its complete form it was a contract by which was conveyed or encumbered the homestead of the defendant Ann O'Toole, which in its complete form was not executed by her; that, if a valid contract or settlement was entered into between plaintiff and Thomas O'Toole on November 20, 1894, as set forth in the complaint, the same amounts to an extension of the time of payment of the indebtedness which said deeds were given to secure, and that, if such deeds were valid and binding, such settlement or contract was an alteration of the contract between the principals which released said Ann and rendered such deeds of no further force and effect, and that if any such contract and settlement was entered into it was not executed or acknowledged by her and was without her knowledge. She also alleges that the debt is paid, and pleads the statute of limitations, and also pleads a final judgment between said Omlie and O'Toole and one Lane, entered in the district court of the seventh judicial district for Pembina county in 1899, to the effect that said deeds were given only as security for the payment of money and as between the parties thereto were mortgages, and that said Thomas O'Toole was the owner of the land described. We may say here that on the trial of said case it developed that \$1,000 of the \$2,800 indebtedness mentioned in the contract of settlement made on the 20th day of November, 1894, between O'Toole and Omlie, was shown to be a mortgage given by Omlie on this land, by which he raised funds to pay a matured mortgage given by O'Toole, then outstanding against the said land, and no claim to recover such \$1,000 or for judgment therefor was made, and such contract or settlement was treated and considered the same as though it had only been for the sum of \$1,800 instead of \$2,800. The defendants Farmers' State

Bank, Robertson Lumber Company, and George A. Bangs, are made parties only for the purpose of foreclosing their right to redeem as subsequent lien holders.

On the trial in the district court, defendants objected to the introduction of any evidence under the complaint for the reasons claimed: First. That it fails to state facts sufficient to constitute a cause of action, in this: that, if an action to recover a money judgment upon a claim or contract, it is fatally defective, in that it shows that the only one of the defendants personally liable is dead, with no one surviving him against whom a personal judgment can be rendered. Second. That it appears from the pleadings that the court is without jurisdiction, power or authority to declare a lien for the amount prayed for in the complaint against the land described. Third. Because the complaint fails to set forth any facts which entitle the plaintiff to equitable relief. The court overruled this objection, and this ruling is assigned among the errors committed by the trial court. We think the complaint, taken as a whole, does not disclose an attempt to procure a personal judgment. The action was begun before the death of Thomas O'Toole, and a personal judgment was prayed for against him. After his death the complaint was amended to recite the fact of his death, and other parties were made defendants—his heirs at law, etc.,—and some portions of the complaint, which might properly have been changed to make it technically perfect, were left unchanged, but, as a whole, we construe it as asking the court to find the amount due from the late Thomas O'Toole to plaintiff. If it can be construed as asking a personal judgment, this does not invalidate the claim for other relief well pleaded. The reasons for the second ground of demurrer are not entirely clear, but we assume them to be based upon the theory that the complaint shows an agreement to mortgage the homestead for the debt of the husband, or to extend the time of payment of the debt secured by such mortgage without the consent of the wife to such an extension. This will be treated later in this opinion, but it is sufficient to say at present that this point assumes as facts things which were sought to be established on the trial, viz., whether the plaintiff was seeking to hold his lien for a different debt from the one secured by the mortgage, and whether the wife had given her consent to an extension, and, if not, whether it was necessary, and was her signature to the defeasance necessary, or was a verbal defeasance adequate. As to the third ground of objection, the com-

plaint sets out facts showing on its face a lien on the premises and asks for relief. If there are other defects in the complaint fatal to plaintiff's claim, they are cured by the answer, which states more fully than the complaint certain of the facts on which the plaintiff relies for his right to recover. If essential averments are omitted in the complaint and supplied by the answer, such defects in the complaint are cured. *Bennett v. Phelps*, 12 Minn. 326 (Gil. 216); *Shartle v. Minneapolis*, 17 Minn. 308 (Gil. 284); *Rollons v. Lumber Co.*, 21 Minn. 5; *Bierer v. Fretz*, 32 Kan. 329, 4 Pac. 284; *Erwin v. Shaffer*, 72 Am. Dec. 613, 9 Ohio St. 43.

After the close of the evidence, plaintiff asked and was permitted leave to amend his complaint to conform to the proof, which proof tended to supply the omissions complained of by defendant in the complaint and conformed to statements of the answer. This ruling is assigned as error. The amendment added a few items of taxes paid and interest paid on the \$1,000 mortgage hereinbefore referred to, and more fully described the debt secured by the deeds to the plaintiff and set out the giving of the mortgage for \$1,000. After a careful inspection of all the pleadings, we see no material change in the claim. Both the original and amended complaints state facts showing a lien on the premises, and ask to have the amount determined and the property sold by the usual method of foreclosure. We think the action of the court comes within the rule permitting the exercise of the discretion of the trial court in allowing amendments, and see no abuse of such discretion, and particularly as no claim was then made that defendants were taken by surprise, or that they were unable to meet the new allegations. It is well settled that, unless the trial court abuses its discretion in allowing an amendment to make the complaint conform to the proof, where there is no substantial change in the claim, such action will not be deemed reversible error.

We deem it advisable, before taking up the contentions of the appellants in detail, to consider certain legal questions involved, relating to the case in general, as this will furnish a starting point from which the effect of the evidence and all other questions can more readily be determined. (1) An instrument, in form a deed, may be proved by oral testimony to be a mortgage as between the parties and all others with knowledge of its purpose. *Rev. Codes 1905*, section 6153; *Patnode v. Deschenes* (N. D.), 106 N. W. 573; *O'Toole v. Omlie et al.*, 8 N. D. 444, 79 N. W. 849. (2) The

character of the two deeds described in the complaint in this case has been determined in *O'Toole v. Omlie et al.*, 8 N. D. 444, 79 N. W. 849, where this court held them to be mortgages, and it is claimed in both the complaint and answer that they were not given as absolute conveyances but as security for debt. (3) Payments on the debt or other acts which interrupt the running of the statute of limitations on the debt also prevent the statute from running on the security. *Mortgage Co. v. N. W. Thresher Co.*, 14 N. D. 175, 103 N. W. 915, and cases cited. (4) Whether the husband may alone extend the time of payment of the debt secured by the mortgage without releasing the mortgage depends on the nature of the interest of the wife in the homestead. See extended note in *Jerdee v. Furbush*, 95 Am. St. Rep. 917. This court has intimated, in a case directly in point, what a wife's interest in a homestead is, where the title, as in this case, is in the husband, and has held that her assent is not necessary to an extension of the time of payment of the mortgage debt, and that without her assent the husband can prevent the statute running against a mortgage of the homestead. The facts in the case cited *infra* are so nearly identical with those of the case at bar in relation to this phase, and the principles are so fully discussed in the opinion of Judge Morgan in that case that no additional consideration of this point is now necessary. We reaffirm the principles there developed. *Roberts v. Roberts*, 10 N. D. 531, 88 N. W. 289. That case also settles the question as to her suretyship, and in any event, if she was a surety, the burden was on her to show that she did not consent to any extension of the time of the payment. *Patnode v. Deschenes* (N. D.) 106 N. W. 573. The remaining questions to be considered in this case relate largely to the sufficiency of the evidence and to its admissibility.

It is claimed by the defendants that the debt for which the deeds were given as security has been paid, and that, if not paid, it has not been identified as the debt described in the settlement, made on the 20th day of November, 1894. The plaintiff was sworn as a witness in his own behalf, and inquiry made of him as to certain exhibits that were offered in evidence. These exhibits may be resolved into two classes. Certain notes given by Thomas O'Toole to third parties, and evidently purchased by Omlie were offered for the purpose of showing how the original indebtedness arose, and he testified on this subject, over objection, that he was disqualified under the statute relating to one party testifying in his own behalf

relating to a transaction with a deceased person. We deem this evidence entirely immaterial, as it was established by other evidence that the indebtedness declared upon in the complaint was in the main a continuation of the same indebtedness for which the second deed was given as security, and it was unnecessary to show how the original debt was incurred. So, conceding, for the purposes of this case, that Omlie was disqualified as a witness on those transactions, no injury was done the defendants. The remaining part of his testimony identified certain interest coupons on the \$1,000 mortgage, which he had given on the premises described, and which we have hereinbefore referred to and to the fact of his payment of taxes upon the same premises. This testimony did not relate to transactions with Thomas O'Toole, but to payments made to third parties to protect his interest in the premises. In our view of the law disqualifying the party, invoked by the defendants, it would be an unwarranted extension of the statute to hold that his testimony in this regard came within the prohibition. We are not disposed to extend the doctrine of this disqualification by making it apply any further than the plain terms of the statute necessitate its application. The reasons for this are very forcibly expressed by Judge Corliss in *St. John v. Lofland*, 5 N. D. 140, 64 N. W. 930, where he said: "Statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them by destroying the evidence to prove such claims than there would be fictitious claims established if all such enactments were swept away, and all persons rendered competent witnesses. To assume that, in that event, many false claims would be established by perjury, is to place an extremely low estimate on human nature and a very high estimate on human ingenuity and adroitness. He who possesses no evidence to prove his case, save that which such a statute declares incompetent, is remediless. But those against whom a dishonest demand is made are not left utterly unprotected because death has sealed the lips of the only person who can contradict the survivor, who supports his claim with his oath. In the legal armory there is a weapon whose repeated thrusts he will find it difficult, and in many cases impossible, to parry if his testimony is a tissue of falsehoods—the sword of cross-examination. For these reasons which lie on the very surface of this question of policy, we regard it as a sound rule to be applied in the construction of statutes of the character of the one whose interpretation is here involved that they

should not be extended beyond their letter when the effect of such extension will be to add to the list of those whom the act renders incompetent as witnesses." And Prof. Wigmore, at section 578 of his work on Evidence, gives other and forcible reasons why this doctrine should not be extended. The vice of this statutory rule is manifest in the case at bar. The right of the plaintiff to recover depends largely, if not wholly, upon the question whether the indebtedness described in the settlement of November 20, 1894, was the same as that for which the second deed was given as security. O'Toole, the debtor, was dead at the time of the trial. Notes given by O'Toole to the plaintiff were offered in evidence, dated between the time the deed was given and November 20, 1894, and it was sought to determine whether they, together with the notes of November 20, 1894, were evidence of new and different indebtedness, or whether they were simply renewals or continuances of the original indebtedness secured by the last deed. Omlie could not, under the statutes, testify as to this fact. Receipts for money paid to O'Toole by him were offered in evidence by the defendants without any explanation to indicate whether the payments were made upon the indebtedness in question or upon the other indebtedness. Without doubt Omlie could have explained the whole matter, but the statute precludes his doing so, on the theory that no party to an action of this kind will tell the truth and that no cross-examination can be made or evidence adduced which will impeach his testimony or establish the facts. We conclude that his testimony as to the payment of the interest and taxes were transactions with third parties, and was both competent and material. *Bank v. Tufts*, 14 N. D. 238, 103 N. W. 760.

The defendants offered in evidence two notes given by O'Toole to Omlie on the day the second deed was acknowledged, and marked "Satisfied," under date of February 7, 1889, and they concede that these notes evidence the indebtedness for which the deed was given as security, but contend that the indorsement of the words "Satisfied, February 7, 1889," indicates that they were paid, and that indebtedness canceled and that the deeds should have been canceled. Other notes were offered in evidence bearing date between then and the 20th of November, 1894, having a tendency to show that there was a continuous indebtedness, and Mr. J. H. Fraine, an attorney at Grafton, testified that he had acted for Omlie and O'Toole in the preparation of the instrument bearing date November 20,

1894, and the notes in controversy; and had overheard and participated in a conversation which took place at that time in his office between O'Toole and Omlie as to the amount of the indebtedness between the parties on that date, and as to the items constituting it. It is clear that on the date of this settlement which occurred between Omlie and O'Toole in Fraine's office both Omlie and O'Toole considered Omlie the owner of the land by reason of these deeds, and that at that settlement the account between them by reason of the indebtedness was stated and agreed upon, and that that agreement which was in writing, also provided under what terms Omlie should redeed the land to O'Toole, and his conversation, as shown by the testimony of Fraine, was on the theory that Omlie was the owner of the land at that time. However, that question was decided by this court in *O'Toole v. Omlie et al.*, *supra*, adversely to the belief of both Omlie and O'Toole. It is unnecessary to quote Fraine's testimony at length, but, among other things, he identified the indebtedness of November 20, 1904, with the indebtedness at the time the deed of February 1, 1887, was given. Mr. Fraine says in relation to the conversation: "As I understood it, it is just as I have stated, that some years before O'Toole had been compelled by the stress of circumstances to sell Omlie this land, and that the amount that he sold it for was the amount that he then owed Omlie. That amount was computed with interest and the \$1,000 mortgage or some mortgage—I understood it was a \$1,000 mortgage—was added to that amount and that was the amount that was to be the consideration of this contract." We think that the testimony of Mr. Fraine sufficiently identified the indebtedness as the indebtedness which the deed was given to secure. It is not necessary to consider whether under the facts of this case the security of the deed could have extended to any other indebtedness than that existing at the time it was given, and for which it was then security, and extensions of time of payment or renewals of such indebtedness. As we have before indicated, we hold that it covers any extension of time or renewals of the original indebtedness without the assent of Mrs. O'Toole; and it is also security for taxes paid, as well as interest on the prior incumbrance paid by Omlie to protect the title of the land.

Under all the circumstances, we think that the fact that the notes given at the time the deed was acknowledged and conceded by the defendants to be the indebtedness secured by the deed were marked

"Satisfied" does not indicate in this case that they were actually paid, other than by renewals or extensions. In other words, the indorsement on those notes does not overcome the weight of the testimony by Mr. Fraine. This theory is strengthened by the fact that those notes with interest computed in accordance with their terms amount to within \$2 or \$3 of the \$1,800 debt on the 20th of November, 1894; and the evidence leaves no doubt that the payments shown by the defendants were made upon other indebtedness existing between O'Toole and Omlie. Their dealings had extended over many years, and related to many subjects, and Omlie had the right, in case payments were made without directions that they should be applied upon any part of the indebtedness or upon this particular indebtedness, to apply them on any demands he had against O'Toole, and we cannot presume that they should have been applied upon this under the circumstances without proof of that fact, and there is an entire lack of such proof.

Having concluded that the debt on the 24th day of November, 1894, evidenced by the notes aggregating \$1,800, represented the original debt, the plea of the statute of limitations is disposed of. The amount for which judgment was entered in the district court is less, rather than more, than the original debt, with interest and taxes and interest paid. Finding no other error and the plaintiff not complaining of this, the judgment of the district court is affirmed, with costs to respondent. All concur.

FISK, J., being disqualified, TEMPLETON, J., of the First judicial district, sat in his place.

(112 N. W. 677.)

EULA L. McLAIN v. H. NURNBERG.

Opinion filed May 3rd, 1907.

Abatement — Former Action Pending.

1. Plaintiff recovered judgment in justice court for possession of certain premises and for rent up to a specified period. Defendant appealed from the judgment to the district court, and gave an approved supersedeas bond for stay of execution, and said appeal was pending and undetermined when plaintiff commenced another action for possession of the same premises against the same defendant and for rent from the time of the recovery thereof in the former action. Defendant pleaded the pending of the former action in his answer. *Held*, that the former action was a bar to the second one.

Same — Identity of Cause of Action.

2. When the second action is based on substantially the same state of facts as the first, the second action will be dismissed as vexatious.

Appeal — Irregularities — Motions — Waiver.

3. Irregularities in the certificate of the trial judge to the judgment roll are of no avail to the respondent in this court, when not raised by a motion before the appeal is submitted on the merits.

Same — Objections Not Raised Below.

4. Indefiniteness in a stipulation under which evidence is received on the trial in the district court cannot be taken advantage of on appeal, unless based on some objection or motion made in the trial court.

Appeal from District Court, Stutsman County; *Fisk, J.*

Action by Eula L. McLain against H. Nurnberg. Judgment for plaintiff, and defendant appeals.

Reversed and remanded.

S. E. Ellsworth, for appellant.

In forcible entry and detainer recovery of rent and damages cannot be had without recovery of possession. *Murry v. Burris*, 6 Dak. 170, 42 N. W. 25; *Caulfield v. Stevens*, 28 Cal. 118; *McCleary v. Crowley*, 56 Pac. 227; *Dale v. Doddridge*, 1 N. W. 999.

Pending of an appeal in a former suit is a good plea in abatement of a subsequent suit between same parties for same subject matter. 1 Enc. Pl. & Pr. 757; *Fisk v. Atkinson*, 12 Pac. 490; *Dale v. Doddridge*, *supra*.

J. A. Murphy and *S. L. Glaspell*, for respondent.

Two suits for rent for different periods do not present the same issues. 1 Enc. Pl. & Pr. 771; *Willson v. St. Paul, M. & M. R. Co.*, 44 Minn. 445; *Vance v. Olinger*, 27 Cal. 358.

MORGAN, C. J. This action is between the same parties and concerns the same property as the case of *McLain v. Nurnberg* (just decided), 112 N. W. 243. Like that action, this is brought for the possession of certain real property and for rent under the forcible detainer statute of this state. In the former action the possession of the lot was demanded, together with judgment for the

rent due up to April 14, 1903. A trial was had in justice court, and the plaintiff recovered judgment for the possession of the lot and for all rent due up to the date named. The defendant appealed to the district court from the judgment, and gave a supersedeas bond conditioned for the payment of "all rents for the use and occupation of said property and all damages from the time of said appeal until the delivery of possession thereof by him to said plaintiff." Pending that appeal, and before the trial thereof in the district court, this action was commenced. It was brought for the possession of the same property, and for the sum of \$25 rent, and for the sum of \$25 damages for the detention of the property. The rent and damages claimed in the last action were claimed as due from the time that damages and rent were allowed in the first action. It therefore appears that the two actions involved the same issues, except as to the time during which rent and damages were claimed. The defendant interposed by answer the defense that another action was pending and undetermined involving the same issues. Upon a trial in justice court there was a judgment in favor of the defendant; a jury having been regularly waived. The plaintiff appealed to the district court, and upon a trial to the court without a jury the judgment of the justice of the peace was reversed, and a judgment in favor of the plaintiff for rent and damages was rendered. From this judgment the defendant has appealed to this court.

Many of the errors assigned on this appeal were disposed of on the appeal in the former action, involving similar, if not identical, issues, and need not be referred to on this appeal.

The principal contention on this appeal pertains to an alleged error that did not arise on the former appeal. The answer, so far as it alleged a former action pending, was as follows: "That as a further defense to the action of the plaintiff the defendant shows to the court: That on the 11th day of April, 1903, an action at law was commenced before Peter Pearson, a justice of the peace in and for Stutsman county, North Dakota, by the plaintiff in this action, to recover possession of the rooms occupied by this defendant in the building situated on lot 4, block 18, city of Jamestown, North Dakota, being the same and identical rooms and premises as described in the complaint in this case, and for recovery of possession of which this action is brought; that upon the trial of said cause a finding was made and a final judgment rendered by said justice of the peace, Peter Pearson; that from the finding made and judgment rendered,

as above set forth, an appeal was taken to the district court of Stutsman county, North Dakota; that a bond was given by the defendant to indemnify plaintiff against any and all loss and for all rents and damage by reason of any unlawful detention of said premises by defendant; that said bond has been approved and accepted by the proper authority prior to the commencement of this action, and now in full force and effect; that the parties plaintiff and the parties defendant in the aforementioned suit are the same parties plaintiff and parties defendant in this case, and all of the issues involved in this case are the same and identical issues as are awaiting adjudication in that case now pending in the district court of Stutsman county, North Dakota, as by the record thereof remaining in said court appears."

It is contended that the answer does not state facts sufficient as a plea of a former action pending, for the alleged reason that its allegations are mostly matters of conclusion. No demurrer was interposed thereto, nor was any objection made to the introduction of evidence in support of it. The objection to it is first raised in this court by way of argument. If the answer be deficient technically under strict rules of pleading, we think that the objections should not now be noticed. The trial proceeded to judgment without objection to the answer; hence we deem that the defective allegations thereof were waived and cannot now be taken advantage of. The objections to it are technical, and could easily have been amended if attention had been called to them on the trial. The question is therefore squarely presented by the amended abstract whether the former action was a bar to this one. As before stated, the only distinguishing fact between them is that rent for a different and later period was sued for in this action. Otherwise the issues are in all respects identical. It is elementary that, unless the issues are identical in the two actions, an answer pleading the pendency of the former action must fail. If, however, the issues are the same, the answer setting forth the pendency of the former action will be sustained, as litigants are not to be harassed by a multiplicity of suits, or even two suits involving the same issues.

The principal issue in the first case was the right to the possession of the premises. The jury found on the trial that the defendant was not entitled to the possession. There was an appeal from the judgment on that verdict. A stay of execution was procured by the giving of an undertaking, conditioned in the precise language of

section 6774, Rev. Codes 1899, that the defendant would surrender possession if the judgment was affirmed, and would pay all damages and all rent due up to the time of the surrender of possession. By virtue of the provisions of said section the giving of the stay bond entitled the defendant to remain in the undisturbed possession of the premises until the termination of the litigation and secured to the plaintiff indemnity for damages and rents. If another action for possession and accruing rents is lawfully maintainable after the giving of such a bond, the statute permitting a stay of execution in such cases is of no practical use. Everything that the plaintiff could hope to accomplish by the second suit will be obtained by her by virtue of the provisions of the bond. Hence, so far as practical results are concerned, the bringing of another action added nothing to the plaintiff's rights. They were all provided for by the bond given pursuant to law.

It is claimed that the plaintiff could not recover for rent for any period after the commencement of the action. We do not think the contention tenable. It is certain that section 6774, *supra*, under which the bond was given, secures the recovery for all rents up to the disposition of the appeal. Besides that section, a recovery for rents to the day of verdict or judgment is recoverable under section 4973, Rev. Codes 1899, which reads as follows: "Damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof or certain to result in the future." Under this section, the rent asked for in the second suit could have been recovered in the first. In *Hicks v. Herring*, 17 Cal. 566, the court said: "It was different with the rents and profits. The monthly value of these was known at the institution of proceedings. For them a claim was made, and the loss of them was a necessary consequence of the deprivation of the possession, and of necessity continued until restitution. The plaintiff could therefore properly recover for them up to the time of the verdict, for the rule is that the proof of damages may extend to all matters up to that period which are the natural result of the previous injury." 2 Greenleaf Ev. section 268. The injury in this case is the unlawful holding of possession after the termination of the lease. It is also held in California that the recovery of damages for continued trespass or waste may be recovered up to the rendition of verdict without amendment of the complaint or supplemental pleading. *Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189; *McLennan v. Ohmer*, 75 Cal. 558, 17 Pac. 687;

Morgan v. Reynolds, 1 Mont. 163. The plaintiff was therefore entitled to recover all the relief in the first action that she could secure in the second, and the bond secured to her the payment of all damages and rent. If the causes of action set forth in the complaints in the two actions state substantially the same facts, the plea of a former action pending should be sustained. In 1 Enc. Pl. & Pr., p. 763, the rule is stated: "But it may be laid down as a general proposition that where the substantial fact or facts upon which the plaintiff's right to relief is based are identical in the two actions, and the relief obtainable in the first includes all the relief sought in the second action, the first will abate the second, although the actions differ in matters of form and in the relations of the defendant to the infringement of the plaintiff's rights." It is clear to us that the pendency of the former action was proven, and that the former action was substantially identical with the latter. The defendant was entitled to recover for that reason.

Some minor points of practice are raised by the respondent, which will be very briefly considered. Objection is now made in argument, and not by motion, that the certificate of the district judge, pursuant to rule 9, Sup. Ct. Rules (74 N. W. vi.), does not enumerate all the papers making up the judgment roll. If the point has any merit, it cannot be raised except by motion duly made prior to submission of the argument on the merits of the appeal.

This action was tried in the district court pursuant to a stipulation in open court that the record of the prior trial should be considered as the record on the trial of this case so far as applicable. The objection is now made by argument only that the stipulation is so indefinite that it cannot be determined what papers are to be considered on this appeal. A statement of the case was settled by the trial judge, and any irregularities or loose practice of a prejudicial nature should have been corrected and made definite by proper action at the settlement of the statement or by motion in this court. Any such irregularities cannot be taken advantage of now, as they have been waived.

The complaint was amended in the district court, and also in the justice court. No answers were made to these amended complaints. It was not necessary, as the answers on file were applicable to the facts stated in the amended complaints, and were so considered on the trials.

For the error in not giving effect to the answer setting forth the pendency of a former action, the judgment is reversed, and the cause remanded for further proceedings. All concur.

FISK, J., disqualified. TEMPLETON, district judge of the First district, sitting by request.
(112 N. W. 245.)

EULA L. McLAIN v. H. NURNBERG.

Opinion filed May 4, 1907. Rehearing denied June 24, 1907.

Forcible Entry and Detainer — Landlord and Tenant — Effect of Surrender of Possession on Action.

1. Where a tenant, pending an appeal from a judgment against him in justice's court in an action of forcible detainer for the possession of real estate and for the recovery of unpaid rent, surrenders the possession of the property, the trial may legally continue in the district court to determine the issue on the question of rent.

Same — Jurisdiction — Filing Notice to Quit With Justice.

2. A justice of the peace acquires jurisdiction to try and determine an action for forcible detainer under section 8406, Rev. Codes 1905, by the giving of a notice to quit although such notice is not filed with the justice when the summons is issued.

Same — Failure to Pay Rent.

3. An action for the possession of real estate under the forcible detainer statute may be maintained when the tenant fails to pay the rent within three days after it falls due.

Same — Sufficiency of Notice — Waiver.

4. An objection to a notice to quit leased premises on the alleged ground that the notice does not allege the ground on which the possession is claimed is waived by going to trial without specifically attacking the notice on that ground.

Same.

5. A notice to quit is not waived by the failure to commence an action for possession until 60 days from the time of giving such notice.

Appeal — Review — Amendment — Waiver of Objection.

6. Where the trial court grants leave to amend a complaint and to file the former amended complaint at a later time, and the trial proceeds on the theory that the complaint has been regularly amended, and no objection is made to the irregularity until the case reaches the Supreme Court on appeal, the irregularity is waived.

Same.

7. The fact that a verdict is given for a sum larger than demanded in the original complaint cannot be first raised on appeal.

Same — Evidence to Sustain Verdict.

8. The insufficiency of the evidence to sustain the verdict cannot be raised for the first time on appeal, and not then until the particulars are pointed out on new trial proceedings.

Same.

9. Objections to the competency of evidence cannot be raised for the first time on appeal.

Trial — Instructions.

10. A requested instruction is properly refused, unless it is applicable to the facts as proven or to some theory of the evidence given in the case.

Attorney and Client — Authority.

11. An attorney employed to collect rent and to serve certain notices has no power by virtue of such employment alone to make new contracts for his principal.

Appeal from District Court, Stutsman County; *Fisk*, J.

Action by Eula L. McLain against H. Nurnberg. Judgment for plaintiff, and defendant appeals.

Affirmed.

S. E. Ellsworth, for appellant.

There can be no recovery of damages without recovery of possession. 13 Am. & Eng. Enc. of Law (2nd Ed.) 773; *Caulfield v. Stevens*, 28 Cal. 118; *McCleary v. Crowley*, 56 Pac. 227.

If notice to quit is prematurely served it is void. *King v. Connolly*, 51 Cal. 181; *Martin v. Splivale*, 56 Cal. 128; *Douglas v. Parker*, 5 Pac. 178.

Notice must be proven on the trial. *Stullor v. Sparks*, 31 Pac. 301; *Douglas v. Parker*, 5 Pac. 178.

Notice and proof of service must be filed with the justice before summons is issued. *N. W. Loan & Banking Co. v. Jonason*, 82 N. W. 94; *Vidger v. Nolin*, 10 N. D. 353, 87 N. W. 593; *Murry v. Burris*, 6 Dak. 170, 42 N. W. 25.

Action must commence within a reasonable time after notice. *Douglas v. Parker*, 5 Pac. 178.

To end a tenancy for breach of covenant demand of performance is necessary. 8 Am. & Eng. Enc. Law (1st Ed.) 140; 9 Enc. Pl. & Pr. 56; *Brummagim v. Spencer*, 29 Cal. 662.

The recitals of a receipt given on check accepted for a disputed claim are conclusive in the absence of fraud or mistake. *Rapp v. Giddings*, 57 N. W. 237; *Guldager v. Rockwell*, 24 Pac. 556; *Squires v. Amherst*, 13 N. E. 609; *Abon v. Rathbone*, 8 Atl. 677. Right to recover rent and damages depend upon the right to possession. *McCleary v. Crowley*, *supra*; *Murry v. Burris*, *supra*.

Amended papers must be verified and served. *Satterlund v. Beal*, 12 N. D. 122, 95 N. W. 518.

A judgment upon an excessive verdict cannot stand. *Hammond v. Jewett*, 35 N. W. 188; *Cummins v. Scott*, 20 Cal. 84; *Gyle v. Shoenbar*, 23 Cal. 536.

J. A. Murphy and S. L. Glaspell, for respondent.

Appellate court will not investigate merits where there are no longer merits to investigate. *In re Kaeppler*, 7 N. D. 307, 75 N. W. 253; 2 Enc. Pl. & Pr. 344; *Rolette County v. Pierce County*, 8 N. D. 613, 80 N. W. 804.

MORGAN. C. J. This is an action of forcible detainer. The plaintiff recovered judgment in justice court for the possession of the house and lot described in the complaint and for the sum of \$37, unpaid rent, and damages. The defendant appealed to the district court, and demanded a new trial in his notice of appeal. Prior to the trial in district court the defendant vacated the premises in suit, and the trial proceeded upon the sole issue whether the defendant was indebted to the plaintiff in any sum for rent or for damages on account of the occupancy of the premises. The assignments of error are numerous, but they may all be disposed of by consideration of a part of them as covering or including them all.

It is contended that there must be a reversal for the reason that the verdict and judgment are silent as to the right of the possession of the defendant of the premises at the commencement of the action. There was no issue on the trial in the district court as to the right to the possession. That issue was eliminated by the surrender of possession by the defendant to plaintiff after the trial in justice court. The defendant's contention that no verdict for rent can be sustained without a finding as to the right of possession at the commencement of the trial cannot be sustained. To litigate the right

of possession after possession had been voluntarily given up in a case like this would be litigating an issue already disposed of by the voluntary act of one of the parties. The question whether defendant was entitled to possession when the action was commenced became immaterial. The statute permits a cause of action for unpaid rent to be joined with a cause of action for forcible detainer. The right of possession having been disposed of, the action did not abate so far as the issue as to the non-payment of rent was concerned. Section 8409, Rev. Codes 1905, authorizes the joinder of a cause of action for rent with one of possession. The action is strictly one for possession based on a wrongful detainer, and a recovery for rent is permitted in connection therewith. The cause of action for rent was rightfully joined at the commencement of the action, and, because the question of possession has been determined by the withdrawal of defendant from the premises, we discover no reason why the action should not continue in order that all the issues properly in the case may be speedily disposed of. No authorities are cited in favor of this contention, and we have failed to find any. Cases holding that the right to recover rents is incidental to the right to recover possession do not control the point here involved.

It is argued that the justice of the peace never acquired jurisdiction of the cause, for the reason that the notice to quit was not filed with him at or before the time that he issued the summons. Section 8407, Rev. Codes 1905, provides that a notice to quit "must be given * * * before proceedings can be instituted." There is no statutory requirement that the notice must be filed before summons is issued. We do not think that the absence of a showing that the notice to quit was on file with the justice when the summons was issued defeats his jurisdiction. If such a notice is given before the summons is issued, and that fact is shown on the trial, his jurisdiction is not lost. It is the giving of the notice, and not the filing of it with the justice, that is requisite before the action can be properly instituted. It would be adding to the statutory requirements to hold that filing of the notice is a jurisdictional prerequisite to the commencement of an action. Reliance is placed on *N. W. Loan & Banking Co. v. Jonason et al.*, 12 S. D. 618, 82 N. W. 94, to sustain appellant's contention. The sole question in that case was whether the notice to quit must necessarily be offered in evidence, and it was held that on filing of the same with the justice it became a part of the record. What is there said concerning the necessity of filing the no-

tice before the justice could acquire jurisdiction does not pertain to the point involved and decided. It is true that the service of such notice is a condition precedent to the right to institute the action for possession; but to hold that the filing of it with the justice before a summons can lawfully be issued is jurisdictional is giving a construction to the statute not warranted by its language.

It is further contended that the action of forcible detainer can be maintained only when the tenant "holds over after the termination of his lease or the expiration of his term." The section of the code governing this action reads as follows: "When a lessee in person or by subtenant, holds over after the termination of his lease or expiration of his term, or fails to pay his rent for three days after the same shall be due * * *," Subdivision 4, of section 8406, Rev. Codes 1905. A mere reading of this section is sufficient to controvert appellant's contention. A failure to pay rent for three days after it becomes due is ground for the dispossession of the tenant after the statutory prerequisite of a notice to quit has been complied with. The notice to quit in this case was in writing, and did not specify the ground upon which the tenant was asked to surrender possession. No question was raised as to the sufficiency of the notice in justice court, and the objection was not specifically pointed out in the trial in the district court when the notice to quit was offered in evidence, nor was the attention of the trial court directed to this specific objection at any stage of the trial. The objection was waived by litigating the issues on the merits, even if it were to be conceded that the objection is tenable. The notice was properly given under section 8406, Rev. Codes 1905.

The trial court permitted the plaintiff to amend the complaint and granted leave to file the amendment at a later time. It is claimed that an amended complaint was never filed pursuant to such leave. The trial proceeded without objection on the theory that the amendment had been duly and properly made. The objection is made for the first time in this court that the amendment was not properly incorporated in an amended complaint in accordance with the rule laid down in *Satterlund v. Beal*, 12 N. D. 122, 95 N. W. 518. It is too late to raise the question now for the first time on an appeal on questions of law. There was clearly a waiver of the irregularities complained of. *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359.

The objection that the recovery was for a greater sum than asked for in the complaint is disposed of on the last assignment. The complaint was amended in justice court by demanding judgment for rent in the sum of \$27 and for \$25 damages. In the district court the complaint was amended so as to state what the damages were based on. No objection was made to the sufficiency of the amendment, and no objection was made to the evidence received in support thereof. The insufficiency of the evidence to sustain the verdict cannot be raised for the first time on appeal from the judgment. There was no motion for a new trial made, and the particulars wherein the evidence was insufficient were never pointed out to the trial court. The point is also made that no competent evidence was introduced to sustain a verdict for damages for the unlawful detainer. The evidence was not objected to, and the incompetency thereof was not called to the attention of the trial court, and no ruling made or called for on that question. No assignment is based on any ruling in respect to the reception of such evidence. It is too late now to make an objection to its insufficiency or incompetency.

A motion was made for a directed verdict specifying among other grounds that the evidence showed that there was no rent due when the notice to quit was served, and that in consequence thereof the notice to quit was prematurely served. There was no error in the ruling denying this motion. There was a direct conflict in the evidence as to whether there was any rent due on February 13th, when the notice to quit was served. The dispute arose over the fact whether the plaintiff had authorized the defendant to retain possession of the premises at \$8 per month until April 1st. This question was submitted to the jury, and they found in plaintiff's favor, thus finding that there was some rent due when the notice was given. The defendant paid to plaintiff's agent \$8 for the January rent. The agent had no authority to accept that sum. The payment was made by check, and defendant wrote on the face of said check the words, "in full for rent." The agent turned the check over to plaintiff, who presented it at the bank and received the cash thereon. The check was not presented at the bank for several weeks, and not until plaintiff had notified the defendant that she would claim \$2 more on account of the January rent. Notice to quit was served before the check was cashed, and in this notice \$2 was claimed as unpaid on account of the January rent. Upon this question the appellant asked the trial court to give the following instruction, which he refused to do: "If there was a dispute or disagreement between the parties

as to whether the January rent should be \$8 or \$10, and if the plaintiff, knowing or having reason to know defendant's claim in the matter, voluntarily accepted this \$8 check dated February 2, 1903, and bearing on its face the words "in full of rent to date," and afterward retained, indorsed, and cashed the same without giving the defendant to understand, in any manner, that she claimed a further sum for said January rent, or did not accept said check in full payment, then the plaintiff can recover nothing, there being full satisfaction." The instruction was properly refused, because it was not applicable to the evidence as given. There was undisputed evidence in the record that the check was not cashed until defendant was notified that a balance of \$2 was claimed on account of January rent after crediting the \$8 check. There was therefore no unqualified acceptance of the check as payment in full for January, and the indorsement of the words "in full for rent," could have no binding effect as a matter of law. The instruction assumed facts not proven, and under no theory of the evidence was it applicable. Appellant claims that the notice to quit served on February 13th cannot be considered effectual. This claim is based upon the conceded fact that the forcible detainer action was not commenced until nearly 60 days after the notice was served. Mere delay in bringing the action for that length of time was not a waiver of the rights given by the service of the notice. Nothing was done by the plaintiff to indicate that the tenancy was considered as continuing after the notice was served. No rent was accepted, and there was nothing done except a mere suspension of the right to commence an action. *Newell v. Sanford*, 13 Iowa 191; *Jones on Landlord and Tenant*, section 271.

Several assignments are based upon the exclusion of evidence to show that plaintiff's agent and attorney for the collection of rent gave the defendant permission to occupy the premises until May 1st at \$8 per month. On this assignment it is sufficient to state that it was shown that the agent or attorney had no authority in respect to making new terms as to the tenancy. His employment merely to collect rent conferred no authority upon him to make new contracts. There are other assignments based upon given instructions, but they are not argued, and are therefore deemed abandoned.

Finding no error in the record, the judgment is affirmed. All concur.

FISK, J., disqualified. TEMPLETON, judge of the First district, sitting by request.

(112 N. W. 243.)

THE STATE OF NORTH DAKOTA, EX REL MARY HARVEY v. GEORGE W. NEWTON AND ANNA NEWTON, DEFENDANTS, AND GEORGE W. NEWTON, APPELLANT.

Opinion filed April 30th, 1907.

Contempt — Affidavit Upon Information and Belief.

1. An affidavit upon information and belief is insufficient upon which to base constructive contempt proceedings, and the court acquires no jurisdiction thereunder to issue an attachment for contempt.

Same — Want of Jurisdiction — Waiver.

2. Defendant does not waive such want of jurisdiction by pleading guilty to the charge thus insufficiently alleged.

Appeal from District Court, Williams County; *Goss, J.*

Proceedings by the state, on the relation of Mary Harvey against George W. Newton. From the judgment adjudging defendant guilty, he appeals.

Reversed.

Palda & Burke and *W. S. Lauder*, for appellant.

Affidavit in contempt proceedings must be distinct and positive, not upon information and belief. *State v. Root*, 5 N. D. 487, 67 N. W. 590; *State v. Crum*, 7 N. D. 299, 74 N. W. 992; *Township of Noble v. Aasen*, 10 N. D. 264, 86 N. W. 742; *Kaeppler v. Red River Bank*, 8 N. D. 406, 79 N. W. 869; *State v. McGahey*, 12 N. D. 535, 97 N. W. 865; *Freeman v. City of Huron et al.*, 66 N. W. 928; *Ludden v. State*, 48 N. W. 61; *Herdmann v. State*, 74 N. W. 1097; *Whitten v. State*, 36 Ind. 196; *McConnell v. State*, 46 Ind. 298; *State v. Sweetland*, 54 N. W. 415; *Thomas v. People*, 23 Pac. 326; *Parkhurst v. Kinsman*, 2 Blatchf. 76 Fed. Cases No. 10759; *Sargeant v. Warren*, 22 Wky. Dig. 473.

The proceeding is criminal and must be carried on in the name and by authority of the state. *Township of Noble v. Aasen*, supra; *State v. Root*, supra; *State v. Crum*, supra; *Kaeppler v. Bank*, supra; *State ex rel. Edwards v. Davis*, supra; *Haight v. Lucia and another*, 36 Wis. 355; *Cook et al. v. People*, 16 Ill. 534; *Beattie v. People*, 33 Ill. App. 651; *Rawson v. Rawson*, 35 Ill. App. 505; *Arnold v. Com.*, 80 Ky. 300; *Nelson v. Ewell*, 2 Swan Tenn. 271.

Van R. Brown, state's attorney.

Defendant having appeared and plead guilty cannot object to the jurisdiction of his person. *Caspar v. State*, 27 Ohio St. 572; *State v. Knowles*, 34 Kans. 393.

Contempt proceedings are characterized by the absence of formal pleadings. *Bank v. Buck*, 60 Ill. 105; *Holman v. State*, 105 Ind. 513.

FISK, J. This appeal brings up for review a final order of the district court of Williams county, made on March 29, 1905, adjudging the appellant guilty of a criminal contempt, and sentencing him to imprisonment in the county jail for the period of 90 days and to pay a fine in the sum of \$200 and costs. The alleged contempt consisted in violating a certain perpetual injunction, theretofore issued by such district court, restraining appellant from maintaining a liquor nuisance upon certain premises in the city of Williston. The offense being a constructive contempt, the proceedings were instituted by the issuance of an order for the arrest of appellant and requiring him to show cause why he should not be adjudged guilty of contempt and punished accordingly. Such order was based solely upon an affidavit made by the state's attorney of Williams county, which affidavit, after reciting the proceedings in the action brought to abate such nuisance, including the issuance of the injunctive order therein and the entry of final judgment, enjoining the appellant from further maintaining such liquor nuisance, contains numerous statements, wholly upon information and belief, tending to prove a violation by appellant of such injunctive order and judgment.

That the portion of the affidavit charging, or attempting to charge, a violation thereof, is merely upon information and belief, is, we think, too clear for any doubt. It reads as follows: "Affiant further says that to his best knowledge, information and belief, the said Geo. W. Newton has disobeyed, violated and disregarded said injunctive order and mandate of court herein, in this, to wit: First. That on divers days and on divers times between the ninth day of September, A. D. 1901, and the date hereof, the said George W. Newton did, upon the said premises hereinbefore described, the same being the premises described in said injunctive order of the court, and the said judgment of court, and in the building located thereon known as Newton's 'Saloon' or Newton's 'pig' kept and maintained a place where on said days, and at said times, intoxi-

cating liquors were sold, bartered and given away as a beverage to various and divers persons by the said George W. Newton and by his lessees, agents, employes and servants. Second. That since the 9th day of September, A. D. 1901, the said George W. Newton has erected or permitted to be erected on the said premises hereinbefore described, additions to said building, and that, as affiant is informed and believes, the said George W. Newton has maintained and permitted to be maintained in said building and additions, a place where intoxicating liquors were sold, bartered, and given away, as a beverage, to various and divers persons by the said George W. Newton, his lessees, agents, employes, and servants. Third. That the defendant has, since the granting of said injunction, on the 9th day of September, A. D. 1901, in the drug store on the said property, sold intoxicating liquors as a beverage to various and sundry persons without a druggist's permit and contrary to the laws of the state of North Dakota regarding the sale of intoxicating liquors, under such a permit. Affiant further states that on the said days, and at the said times, the said George W. Newton did personally and by his lessees, agents, employes and servants, use the said described lots 10 and the N. $\frac{1}{2}$ of lot 11, in block 11, of the town of Williston, N. D., and various buildings or parts of buildings situate thereon as a place for keeping for sale as a beverage, intoxicating liquors, without the authority of a druggist's permit as required by law and against the laws of the state of North Dakota relating to the sale of intoxicating liquors under a druggist's permit."

To hold that the latter sentence is a positive statement, and not on information and belief, we must say that it is not a part of subdivision third, and we must construe the same as having no relation or connection therewith, or with the language immediately preceding the first subdivision. It will be noticed that the facts stated in this last sentence are practically the same as those stated in the second subdivision, yet it cannot be contended that the second subdivision is other than on information and belief. Furthermore, respondent's attorney, who made the affidavit, in effect concedes both in his brief and oral argument that it is entirely upon information and belief; his contention being that defendant by his plea of guilty waived such defect.

Upon the return of the order to show cause, the appellant, in open court, not being represented by counsel, although informed of his right thereto, pleaded guilty to the numerous charges set forth in

such affidavit, and was thereupon sentenced by the court as above stated. A few days thereafter, appellant, by his attorney, in open court, moved to vacate such sentence, upon the ground that the same was void for want of jurisdiction in the court to enter it, and upon other grounds unnecessary to mention, which motion was denied, and this appeal is prosecuted to reverse such orders. Numerous grounds are stated by appellant why such orders should be reversed; but the principal ground relied upon in oral argument, and the only one which we deem necessary to mention at any length, is the insufficiency of the affidavit upon which such contempt proceedings were based.

The law is well settled in this state, by repeated decisions of this court, that an affidavit upon information and belief is wholly insufficient upon which to base constructive criminal contempt proceedings, and that no jurisdiction is acquired thereunder. (*State v. McGahey et al.*, 12 N. D. 535, 97 N. W. 865; *Kaeppler v. Bank*, 8 N. D. 411, 79 N. W. 869; *State v. Root*, 5 N. D. 494, 67 N. W. 590; 57 Am. St. Rep. 568), and such is the established rule in other states. (*Ludden v. State*, 48 N. W. 61, 31 Neb. 429; *Swart v. Kimball*, 43 Mich. 451, 5 N. W. 635; *Freeman v. City of Huron*, 8 S. D. 435, 66 N. W. 928; *Thomas v. People*, 14 Colo. 254, 23 Pac. 326, 9 L. R. A. 569; *Young v. Cannon*, 2 Utah, 560; *Herdman v. State*, 54 Neb. 626, 74 N. W. 1097; *Batchelder v. Moore*, 42 Cal. 412; *State v. Sweetland*, 54 N. W. 415, 3 S. D. 503). It would serve no useful purpose to reiterate the reasons for this rule, as given in the foregoing authorities. Suffice it to say that we fully approve the previous utterances of this court upon this question. Moreover, the code (section 9374, Rev. Codes 1905), governing proceedings for contempt under the so-called prohibition law of this state, expressly requires that the affidavit upon which the attachment for contempt issues shall make a prima facie case for the state. This language is clear and explicit, and needs no judicial construction to ascertain its meaning; but we quote briefly from the opinion of Bartholomew, C. J., in *Kaeppler v. Bank*, *supra*, as follows: As the application for the arrest is an ex parte proceeding, and as it is in derogation of personal liberty, the least that can be required is that the applicant make an undoubted prima facie case. Upon well-settled, general principles, this cannot be done, in the absence of statutory sanction, by an affidavit based upon information and belief, for the very evident reason that such affidavit is not competent evidence.

It is merely hearsay. If the affiant were on the stand, he would not be permitted to testify to any such matter, and he certainly will be equally restricted in an *ex parte* affidavit, where he is subjected to no cross-examination; and so are the authorities."

It follows that the court acquired no jurisdiction to arrest the appellant for the alleged contempt, and had no jurisdiction to inflict the punishment complained of, unless the appellant by pleading guilty, as he did, has waived his right to allege such want of jurisdiction. Respondent's counsel contends that: "Appellant cannot now be heard to object to the form and sufficiency of the affidavit, as he has not pleaded guilty to an affidavit, the affidavit being only a part of the evidence which caused the court to issue the order of arrest, and also that appellant pleaded guilty to contempt of court, which plea, when voluntarily entered, without objection, precludes any consideration of the evidence, and left the court no alternative, except to sentence the person so pleading."—citing *Holman v. State*, 105 Ind. 513, 5 N. E. 556. This case is not in point, as it was a direct contempt; that is, a contempt committed in the presence of the court, which was there involved. In such contempts no formal accusation is required. *State v. Root*, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568; *State v. Crum*, 7 N. D. 299, 74 N. W. 992. Counsel is mistaken in asserting that the affidavit was only a part of the evidence upon which the court issued the order of arrest. It was the only evidence that any contempt had been committed, and it constituted the only justification for the issuance of the warrant and the order to show cause. It was the only formal accusation against the defendant. That such an accusation is indispensable in cases of contempts not committed in the presence of the court is established in *State v. Root*, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568, wherein it is stated: "Where, however, as in the case at bar, the fact of the commission of the offense is not within the personal observation of the judicial officer presiding over the court, it becomes necessary to bring the facts before the court by a formal accusation. This is done at common law and under the statute by an affidavit. 4 Enc. Pl. & Pr. 776, and notes. Where this course is pursued, the affidavit at once assumes great importance, as it is not only the foundation for issuing the order to show cause (Rev. Codes 1905, section 5936), but also constitutes—and this is its most important office—the accusation upon which the accused is to be tried for a criminal offense. Under the modern authorities, at least, the suffi-

ciency of such accusation is to be tested by the rules governing the framing of indictments and informations. All the material facts and essential ingredients of the offense are required to be set out by distinct and positive averments; nor can any essential allegation be supplied by implication."

It is therefore the settled law in this state that, in constructive criminal contempt proceedings, a formal accusation is essential, and that such accusation takes the place of an indictment or information in a criminal case, and must be tested by the same rules applicable to indictments and informations. We take it to be equally well settled by the foregoing authorities that such an accusation must state the facts tending to show defendant's guilt by positive averments, and that a statement of such facts on information and belief renders such accusation a mere nullity, and confers no jurisdiction upon the court to entertain the contempt proceedings or to render judgment therein. Counsel's contention is therefore without merit. The fallacy of his argument, evidently, consists in his mistaken idea as to the office of the affidavit. It is the criminal accusation against the defendant, and is not to be treated merely as evidence, as counsel seems to believe. His proposition, then, amounts to this: That because appellant pleaded guilty to a criminal accusation, and failed to object to the jurisdiction of the court until after sentence was pronounced, he thereby forever waived such want of jurisdiction. It is our opinion that, by his plea of guilty, he admitted only such allegations of the charge as were legally alleged, and that, instead of moving thereafter in the court below, as he did, to vacate such order, it being the final determination in the contempt proceedings, he had a right to appeal therefrom, and to urge such jurisdictional defect for the first time in this court. Such defect was fatal to the jurisdiction of the court, and could not be waived by defendant. This is elementary.

It is a well-settled rule in criminal cases, and they are, in our opinion, strictly analogous to this case, that by pleading guilty the defendant merely admits the truth of the facts well pleaded in the accusation against him, and that after such a plea he may take advantage of the insufficiency of the accusation, and, if it charges no offense it may be subsequently attacked on such grounds, even in the Supreme Court for the first time. 12 Enc. 353, and cases cited; 1 Bishop Crim. Procedure, section 795; Fletcher v. State, 12 Ark. 169; State v. Levy, 119 Mo. 434, 24 S. W. 1026; Moore v. State,

53 Neb. 831, 74 N. W. 319; *Crow v. State*, 6 Tex. 334; *State v. Watson*, 41 La. Ann. 598, 7 South. 125; *Republic of Hawaii v. Ah Cheon*, 10 Hawaiian Rep. 469. Mr. Bishop, in his work on Criminal Procedure, above cited, states the rule as follows: "The effect of this plea is a record admission of whatever is well alleged in the indictment. If the latter be insufficient, it confesses nothing." In *Fletcher v. State*, it is said: "But the attorney general submits that, inasmuch as the defendants below pleaded guilty in the circuit court, they thereby waived all objections to the indictment. The law has been long settled otherwise. No confession, however large and explicit, can have any such effect. 1 Chitty on Crim. Law, pages 431, 662, 663. The defendants here but confess themselves guilty in manner and form as charged against them in the indictment, and, if no offense against the law is charged, they have not confessed themselves guilty of any; but if the confession was still broader, and embraced a crime, when the indictment fell short of it, and punishment followed, it would be the punishment of a crime not proceeded for by indictment." In *State v. Levy*, we quote as follows: "The attorney general contends that defendants, having pleaded guilty, are in no position to question the correctness of the proceedings which resulted as aforesaid. But this is a mistake. The effect of such a plea only amounts to an admission by record of the truth of whatever is sufficiently alleged in the indictment, and no confession, however large and explicit, will prevent a defendant from taking advantage of faults apparent of record. If no crime is charged in the indictment, then none is confessed by pleading guilty thereto. Numerous decisions of this court attest that a party defendant in a criminal case may take advantage of a material defect apparent of record, though such point be raised for the first time in this court. *McGee v. State*, 8 Mo. 495; *State v. Van Matre*, 49 Mo. 268; *State v. Vaughn*, 26 Mo. 29; *State v. Meyers*, 99 Mo. 107, 12 S. W. 516; 1 Bish. on Crim. Procedure, sections 1368, 1370." In *Moore v. State*, *supra*, the Supreme Court of Nebraska took occasion to say: "A suggestion made in the argument, and reflected in several places in the state's brief, is that the plea admitted the moral guilt of the defendant, and, to quote the last sentence of the brief, 'having pleaded guilty to all the charges of the information, this court may well hesitate before reversing his plea, and say he is not guilty, after he has said he is guilty.' Surely the attorney general cannot mean to contend that, because the defendant has by his

no other testimony was taken, and the resistance occurred before the defendant was made aware by the sheriff that he was armed with, or attempting to execute, a search warrant, and while the sheriff seemed to be a trespasser; and the court held, in view of these facts, that resistance was not willful, and that the act shown therefore did not come within the definition of the statute. The statute in point in that case only permits the granting of an injunction, such as it was claimed had been violated, upon the affidavit or complaint of the representative of the state on "information and belief," when an affidavit or affidavits of other persons making the required showing had been presented to such representative on which he might base his affidavit. No such requirement is contained in the statute regarding contempt proceedings. Hence the McGahey case and the case at bar are not parallel. In *Kaeppler v. Bank*, 8 N. D. 411, 79 N. W. 869, the plaintiff was arrested in insolvency proceedings, the warrant being issued on an affidavit made on "information and belief." The section of the statute which it was maintained justified the issuance of the warrant or arrest on an affidavit made on "information and belief," in specific terms requires such affidavit to state the facts upon which the information and belief are founded, which that affidavit failed to do. Hence the affidavit in that case clearly failed to comply with the requirements of that statute. In *State v. Root*, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568, no question regarding the sufficiency of the affidavit on which the contempt proceedings were based was involved. The judge of the district court refused to recognize the defendant to make an objection to the jurisdiction of the court, and punished him as for contempt, and also disbarred him in the same proceeding and the case was reversed principally on these grounds. It is true that the learned judge who wrote the opinion in that case injected some remarks into his discussion of the law indicating that affidavits in contempt proceedings should be made positively; but no such question was before the court. The affidavits in that case were positive.

It is true that in some states the courts have expressly held that an affidavit on which to base contempt proceedings is insufficient, if made on "information and belief;" but, generally there is little or no discussion of the question in the opinions, and the case cited in the majority opinion from 42 California is not in point, as I shall show later by citations of other California cases.

The sentence in our statute referred to, as requiring that the affidavit on which the attachment for contempt issues shall make a prima facie case for the state, does not, in my opinion, bear the construction placed upon it by my associate. It would rather appear to indicate that the affidavit may be used in place of other testimony to make out a prima facie case. In other words, that nothing but the affidavit, if it adequately states the facts for that purpose, is necessary to constitute a prima facie case and place the burden upon the defendant. I cite a few of the opinions to the effect that an affidavit on "information and belief" on a statute similar to ours, is adequate. In Washington, the statute required that contempts not committed in the presence of the court be shown to the court by affidavit, and the Supreme Court of that state held, in *State v. Nicoll*, 40 Wash. 517, 82 Pac. 895, that, where an affidavit in contempt proceedings against certain parties alleged a violation of an order of the court by them after advising with an attorney, and upon the hearing such attorney admitted that he advised the violation of the order, the court had jurisdiction to order such attorney made a party to the proceedings, without filing any new affidavit. In *re Cheeseman*, 49 N. J. Law 115, 6 Atl. 513, 60 Am. Rep. 596, is found a most instructive discussion of the principles involved in constructive contempt proceedings. The defendant was charged with contempt of court, and, among other things, it was contended that the proceedings of the court should be annulled because there was no affidavit of the facts as a foundation for the rule to show cause, and the court held that such affidavit is not jurisdictional, except to the extent of bringing before the court matters which constitute a contempt, and affording the parties accused a fair opportunity of denying or confessing their truth, and the court says: "In the present case, the appellant, on the return of the rule to show cause, filed his affidavit declaring the truth of all matter alleged in the rule as the basis for its allowance, and, although the consideration of the cause was adjourned from term to term, yet the appellant never intimated that an affidavit should have been presented before the rule was granted, or that he was entitled to have attachment issued or interrogatories filed, or that the rule should be discharged for want thereof; and, even after the sentence was pronounced, he obtained leave to amend his affidavit, but did not complain of any irregularity or illegality in the proceedings. Under these circumstances, the objection now made cannot be sustained." *Telegram, etc., Co. v.*

plea admitted the facts charged, and therefore a moral delinquency, he should be punished, even if the law does not denounce these facts as a criminal offense. The question before us is not one of moral delinquency, but simply whether the facts charged in the information constitute a crime under the laws of this state. Defendant stands in no worse position, in this respect, than he would on a demurrer to the information, which would, for the purposes of the proceeding, involve the same admission." In *State v. Watson*, it is said: "The state alleges that the plea of guilty cured all the defects in the indictment. * * * By a plea of guilty, the defendant confesses himself guilty in manner and form as charged in the indictment, and, if the indictment charges no offense against the law, none is confessed. 1 Whart. Crim. Law, section 532." Hawaii, through its Supreme Court, has held likewise. We quote: "The defendant was charged with embezzlement, and pleaded guilty. Defendant claimed that no offense was charged upon which judgment could be entered. * * * It is unnecessary to cite authorities to the effect that a plea of guilty only confesses an offense which is properly and sufficiently charged; and, if no offense be charged, then no conviction can be had or sentence passed, for the law is well established." See, also, *Commonwealth v. Mahoney*, 115 Mass. 151.

Appellant attempted not only to appeal from the final order, but also from the order thereafter made, refusing to vacate such final order. Such latter order was not appealable. *State v. Crum*, 7 N. D. 306, 74 N. W. 992. Under the code, an appeal is permitted only from the final order, adjudging the accused guilty of contempt. *State v. Massey*, 10 N. D. 154, 86 N. W. 225; *State v. Crum*, 7 N. D. 306, 74 N. W. 992; Rev. Codes 1905, section 7573.

The final order appealed from is reversed, and the district court directed to dismiss such proceedings.

MORGAN, C. J., concurs.

SPALDING, J. (dissenting). Not having heard the arguments in this case, I am very loath to dissent from the opinion of my associates, but I am impelled to do so by reason of the importance of the principle involved in this decision.

My reasons for dissenting will be stated as briefly as possible. My learned associate, who writes the opinion expressing the judgment of the majority of this court, feels very certain that the affidavit on which the proceedings were commenced is wholly upon information

and belief. Were it not for the fact stated in his opinion that counsel for state on argument, conceded this point, I should be equally certain that one paragraph of the affidavit referred to was stated in positive terms. This would appear clear to me by the context of the last portion of paragraph 3 in said affidavit, beginning with the words: "Affiant further states that on said days," etc. In the printed brief, and in the original record, a very considerable space is left between the first portion of the third paragraph and the part referred to, and likewise between this part and the fourth paragraph, and the affidavit continues in the fourth paragraph expressly on "information and belief," which leads me to think that that part of the third paragraph referred to was fully intended to be a positive statement. However, for the reasons stated above, I shall not discuss this phase of the question, or base my opinion thereon.

The majority opinion says that the law is well settled in this state, by repeated decisions of this court, that an affidavit on information and belief is wholly insufficient on which to base constructive criminal contempt proceedings, and refers to several cases which are cited to establish this doctrine. Whatever should be the construction of our statute, which provides that proceedings may be commenced upon affidavit, I cannot concede that this court has established any such doctrine in the cases referred to. The statutory requirements were different, or the statements were dicta. *State v. McGahey et al.*, 12 N. D. 535, 97 N. W. 865, was a proceeding against the defendant for contempt in resisting a lawful order or precept of the court, namely, a search warrant, and the question considered was as to the sufficiency of the affidavit on which the search warrant was issued. The statute regarding the issuance of search warrants in an action for abatement of liquor nuisances requires such affidavit to state or show that intoxicating liquor, particularly describing it, is kept for sale, or is sold, bartered, or given away on the premises, particularly describing the place where such nuisance is located, and it will be seen that this requirement is much more exacting than the requirements regarding the affidavit on which contempt proceedings are based, and is made so to comply with the Constitution as relating to search warrants. Const. N. D., section 18. The alleged contempt in the McGahey case consisted, it was attempted to be charged, in willfully resisting the execution of a search warrant, and in willfully resisting the sheriff in making search of the premises. Interrogatories were filed and answered,

no other testimony was taken, and the resistance occurred before the defendant was made aware by the sheriff that he was armed with, or attempting to execute, a search warrant, and while the sheriff seemed to be a trespasser; and the court held, in view of these facts, that resistance was not willful, and that the act shown therefore did not come within the definition of the statute. The statute in point in that case only permits the granting of an injunction, such as it was claimed had been violated, upon the affidavit or complaint of the representative of the state on "information and belief," when an affidavit or affidavits of other persons making the required showing had been presented to such representative on which he might base his affidavit. No such requirement is contained in the statute regarding contempt proceedings. Hence the McGahey case and the case at bar are not parallel. In *Kaeppler v. Bank*, 8 N. D. 411, 79 N. W. 869, the plaintiff was arrested in insolvency proceedings, the warrant being issued on an affidavit made on "information and belief." The section of the statute which it was maintained justified the issuance of the warrant or arrest on an affidavit made on "information and belief," in specific terms requires such affidavit to state the facts upon which the information and belief are founded, which that affidavit failed to do. Hence the affidavit in that case clearly failed to comply with the requirements of that statute. In *State v. Root*, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568, no question regarding the sufficiency of the affidavit on which the contempt proceedings were based was involved. The judge of the district court refused to recognize the defendant to make an objection to the jurisdiction of the court, and punished him as for contempt, and also disbarred him in the same proceeding and the case was reversed principally on these grounds. It is true that the learned judge who wrote the opinion in that case injected some remarks into his discussion of the law indicating that affidavits in contempt proceedings should be made positively; but no such question was before the court. The affidavits in that case were positive.

It is true that in some states the courts have expressly held that an affidavit on which to base contempt proceedings is insufficient, if made on "information and belief;" but, generally there is little or no discussion of the question in the opinions, and the case cited in the majority opinion from 42 California is not in point, as I shall show later by citations of other California cases.

The sentence in our statute referred to, as requiring that the affidavit on which the attachment for contempt issues shall make a prima facie case for the state, does not, in my opinion, bear the construction placed upon it by my associate. It would rather appear to indicate that the affidavit may be used in place of other testimony to make out a prima facie case. In other words, that nothing but the affidavit, if it adequately states the facts for that purpose, is necessary to constitute a prima facie case and place the burden upon the defendant. I cite a few of the opinions to the effect that an affidavit on "information and belief" on a statute similar to ours, is adequate. In Washington, the statute required that contempts not committed in the presence of the court be shown to the court by affidavit, and the Supreme Court of that state held, in *State v. Nicoll*, 40 Wash. 517, 82 Pac. 895, that, where an affidavit in contempt proceedings against certain parties alleged a violation of an order of the court by them after advising with an attorney, and upon the hearing such attorney admitted that he advised the violation of the order, the court had jurisdiction to order such attorney made a party to the proceedings, without filing any new affidavit. In *re Cheeseman*, 49 N. J. Law 115, 6 Atl. 513, 60 Am. Rep. 596, is found a most instructive discussion of the principles involved in constructive contempt proceedings. The defendant was charged with contempt of court, and, among other things, it was contended that the proceedings of the court should be annulled because there was no affidavit of the facts as a foundation for the rule to show cause, and the court held that such affidavit is not jurisdictional, except to the extent of bringing before the court matters which constitute a contempt, and affording the parties accused a fair opportunity of denying or confessing their truth, and the court says: "In the present case, the appellant, on the return of the rule to show cause, filed his affidavit declaring the truth of all matter alleged in the rule as the basis for its allowance, and, although the consideration of the cause was adjourned from term to term, yet the appellant never intimated that an affidavit should have been presented before the rule was granted, or that he was entitled to have attachment issued or interrogatories filed, or that the rule should be discharged for want thereof; and, even after the sentence was pronounced, he obtained leave to amend his affidavit, but did not complain of any irregularity or illegality in the proceedings. Under these circumstances, the objection now made cannot be sustained." *Telegram, etc., Co. v.*

Commonwealth, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280, was a contempt proceeding. A summons was made and issued by the court of its own motion without complaint, and the court held that, when the contemptuous matter comes in any manner to the attention of the court, the court can, of its own motion, institute proceedings for contempt, and that no formal complaint is necessary. The court says such a power is necessary for the court's own protection against the improper administration of justice, and that, if the act interferes with the due administration of justice in a case before the court, the contempt is analogous to a contempt committed in the presence of the court. *Jordan v. Circuit Court*, 69 Iowa 177, 28 N. W. 548, reports a contempt proceeding for violating an injunction, and the sufficiency of the affidavit was in question, and the court held that when the statute required the filing of an affidavit showing the nature of the transaction, inasmuch as the statute did not expressly provide that the affidavit should show that the person making it had personal knowledge of the facts, it was compliance with the statute without showing this. In *Golden Gate Mining Co. v. Superior Court*, 65 Cal. 187, 3 Pac. 628, the petitioner had been adjudged guilty of contempt, and it was contended that as the affidavits on which the order to show cause were based were made wholly on "information and belief," and as the contempt (disobeying an injunction) had been committed out of the presence of the court, the court had not acquired jurisdiction, and the Supreme Court of California held that the jurisdiction of the court in such case does not depend upon the form of the affidavit which sets the proceeding in motion, and says: "An order to show cause was issued and served, and defendant had an opportunity to appear and answer any contempt charged against him. The omissions in the affidavit upon which the order was made may have been irregularities, but the commitment was not based upon the affidavits, but upon the testimony of witnesses, etc., on the return day of the order to show cause."

In the case at bar the commitment was not based on the affidavit of the prosecuting attorney, but upon the solemn admissions, and the request of the defendant, made and entered in the records of the district court on the return day of the order to show cause. From these cases it appears that some very respectable courts have held, on statutes in most cases identical with ours, that an affidavit stating the facts on "information and belief" is adequate to give the court

jurisdiction. But, in my opinion, a much stronger ground for holding that the district court had jurisdiction in the case at bar is found in the waiver of the defendant. To understand this, perhaps a further statement of the facts may be necessary. When this contempt proceeding was instituted, the injunction in the main proceedings was still in force. It was a proceeding in equity. The court already had jurisdiction of the subject matter, if not of the person of the defendant, and all that was necessary to enable the court to set its machinery in operation, to determine whether the defendant had committed a contempt, was to have the court's attention called to the facts constituting the contempt, and I am in no sense certain that any method of doing so, satisfactory to the court, would be inadequate; but, in any event, the court issued this order on the defendant to show cause. With it was included an order to the sheriff to attach the person of the defendant and admit him to bail pending the return. The sheriff served the order to show cause upon the defendant personally within the county. He did not execute that part of the order directing the attachment of the person of the defendant, so, in effect, the order returned was simply a direction to the defendant to show cause on the day named why he should not be punished for contempt of court in disobeying the injunction in the proceeding named.

This left the proceedings with precisely the same standing as though no order of attachment had been issued, but simply an order to show cause. The defendant appeared voluntarily on the return day. The court filed with the clerk 16 written interrogatories, and called the matter for hearing. The record discloses that the defendant then appeared in person, and in response to the court's inquiry stated openly to the court that he had decided to plead guilty to the charges made in the affidavits and attachment and order to show cause, and to the charge of wilful disobedience to the order of that court theretofore made, enjoining and restraining him from selling intoxicating liquors unlawfully, and keeping the same for sale unlawfully, or keeping a place where persons resort for the purpose of drinking intoxicating liquor as a beverage contrary to law. The court advised him of the right to an attorney, and the defendant replied to this advice that he did not care for an attorney, that he had thought the matter over, and understood the charge and the law in regard to the matter, and desired to plead guilty to the charge, namely, criminal contempt of an order of said court, and the record continues: "Said defendant did accordingly plead guilty, which plea

was accepted by the court, and the order entered by the court." On inquiry of the defendant, if he had any legal cause or reason to offer why sentence of the court under said criminal contempt and because thereof should not be immediately at that time and place passed upon him, he replied that he had none, and that he had no objection to the passing of sentence at that time by the court pursuant to said plea of guilty. The court thereupon pronounced sentence.

It would seem that by this proceeding the defendant, if any irregularities had existed in the method of calling the attention of the court in the first instance to his disobedience of the court's orders, had waived such irregularities, and the authorities are ample to support this view. I cite only a few: In *People ex rel. Brooklyn Industrial Ass'n v. Kearney*, 21 How. Prac. (N. Y.) 74, an attachment was issued against one Kearney, who appeared on the return day, when interrogatories were filed, and an adjournment granted to afford him an opportunity to answer, which he did. Further interrogatories were filed and answered after a second adjournment, to give him an opportunity to do so. During the proceedings no objection was made by the defendant that he had not been served by a copy of the judgment of the court which he was charged with disobeying, and the court holds that, inasmuch as the defendant had seen fit to acquiesce in the irregularity of the attachment, and took his first objection at the hearing, after answering the interrogatories, his objection came too late. In Illinois it is held that, where the party charged with contempt comes into court and asks time to answer, and enters into a recognizance to appear and abide by the decision of the court, he waives all objections as to the manner of being brought into court. *People v. Pearsons*, 3 Scam. (Ill.) 270. In *State v. Falk*, 46 Kan. 498, 26 Pac. 1023, the record shows that the information nowhere shows who had knowledge of any of the offenses charged, and that it was not supported by oath or affirmation of any one, and that no statement of any witness was filed with the information. No motion was made to quash the information or warrant, and the court held that these objections were waived by **the defendant in pleading guilty**. This identical point was before the court of appeals in New York, and is reported in *People v. Court*, 147 N. Y. 295, 41 N. E. 701, where it was said: "The court undoubtedly obtained jurisdiction of appellants when they appeared before it and were charged with contempt. The only office of the or-

der to show cause was to bring them before the court, and, if it was issued on an insufficient affidavit, they must now be deemed to have waived the defect by their personal appearance and answer." In *State v. Knowles et al.*, 34 Kan. 393, 8 Pac. 861, the defendants pleaded guilty, and then filed a motion in arrest of judgment on the ground that the facts stated in the complaint did not constitute a public offense, and the court says: "Counsel, however, omits one important matter in his argument. No motion was made in the case under consideration in the district court to quash or amend the complaint. So far as criminal pleading is concerned, few cases remain in which motions in arrest of judgment can reach. Technical errors in a pleading cannot be considered by a motion in arrest of judgment after a verdict or plea of guilty. Therefore, any errors as to the form of complaint or information, which might have been taken advantage of by a previous suggestion, are not a sufficient cause, and after a verdict or plea of guilty, to arrest judgment. *

* * Where an averment which is necessary to support a particular part of a complaint or information filed in a criminal case is imperfectly stated, or is stated in very general terms, a verdict or plea of guilty cures the defect or averment, although the averment might have been bad on demurrer or motion to quash." And the court then defines what the plea of guilty admitted. In that case it admitted the ownership and occupation of the premises affected, and it admitted the acts which were claimed to be imperfectly stated.

In this case the plea of guilty admitted that the defendant had wilfully disobeyed the order of the court, enjoining him from making certain use of the premises described, and no amount of testimony offered could have made the case against him stronger. The statute requiring an affidavit is but an affirmation of the practice at common law, and contempt proceedings under the prohibition law, so called, have already been held by this court not subject to the rules by which other contempt proceedings are governed. *State v. Massey*, 10 N. D. 154, 86 N. W. 225. In *State v. Sarratt*, 14 Rich. Law, 29, the Supreme Court of South Carolina had under consideration a case where a warrant was issued where no indictment had been found. The defendant appeared and defended, and the court says: "Suppose that for this and other reasons the bench warrant was irregular and void, it would follow that his arrest under that warrant was unlawful; that his recognizance, if he gave one, might be impeached for duress, and that his counsel might have moved for his

discharge from arrest and recognizance; but his counsel appeared and pleaded, and he was present and made defense. Nothing which preceded could destroy the effect of this acknowledgment of the jurisdiction of the court over his person in his case." This statement is approved by the same court in *Ex parte Keeler*, 23 S. E. 865, 45 S. C. 537, 31 L. R. A. 678, 55 Am. St. Rep. 795, as late as 1896. See, also, *Ex Parte Acock*, 84 Cal. 50, 23 Pac. 1029, and *In re. Cheeseman*, *supra*. The Supreme Court of California also holds squarely that, where a party appears and files an answer to the rule to show cause in contempt proceedings, the court acquires full jurisdiction over his person as well as the subject matter. In *re Cohen et al.*, 5 Cal. 494. In *Emery v. State*, 111 N. W. 374, in an opinion filed March 21, 1907, the Supreme Court of Nebraska says that "This defect (verifying an affidavit on which the defendant was prosecuted for contempt on information and belief), if it be such, was waived, for we find the accused made no objection to the complaint, but filed his answer of 'not guilty' together with a general denial, and immediately announced his readiness to proceed to trial," and raised objection to the complaint for the first time on motion for a new trial. If further citation of authorities is necessary, we need not look beyond the decision of this court which, expressing its opinion in *State ex rel. Poul v. McLain*, 13 N. D. 368, 102 N. W. 407, through Judge Engerud, said: "If the defendant had made seasonable objection to the proceedings upon this ground (that the complaint was stated and verified on information and belief) the objection would have been sustained; but the provision in question being a provision designed for the protection of the person sought to be arrested, he has it in his power to waive its protection. By voluntarily furnishing bail without objection, and seeking and obtaining repeated continuances and a change of venue, it is perfectly clear that he has most emphatically waived any objection he had to the institution of the proceedings without a sufficient showing of probable cause." The above quoted case in some degree sustains the opinion in the case at bar on the insufficiency of a complaint made on information and belief to confer jurisdiction to make an arrest, which is not in this case, but is directly in point as to the waiver.

From these authorities, and from the circumstances surrounding these proceedings, it appears to me that the defendant has waived any irregularities, if such existed in the affidavit filed, as a basis for the issuance of the order to show cause; that he submitted his per-

son to the jurisdiction of the court, and by such submission, even if the affidavit was defective, the court acquired jurisdiction; and that the statute, under circumstances like these, where the defendant had every opportunity offered him to question the regularity of the proceedings and the jurisdiction of the court at a time when the proceedings, if irregular, or originally wanting in jurisdiction, could have been amended or corrected, and, when he himself voluntarily furnished the evidence for his conviction, should not be strained to defeat justice, but rather that the ends of justice will be best served by taking him at his word. To hold that he could appear in court, and, if any evidence were lacking to establish his guilt, voluntarily furnish such evidence himself, and ask the court to pass sentence for the acts charged and confessed, and then allow him to escape punishment, not because of any defects in the substance of the charges or in the proof, but simply in the manner of statement, is to hold that the defendant may disregard the mandates of the law, the solemnity of the occasion and proceedings, and make a plaything of the court. He has had his day in which to demur to the information, to move to quash, and to submit a motion in arrest of judgment, some of which proceedings would have afforded him ample opportunity to take advantage in an orderly way of the alleged defects. He waived his rights under these regular and approved methods, led the court to act without putting him to the expense of counsel or witnesses, and the court took him at his word. He now comes to this court to seek the relief which the district court could have afforded, if he was entitled to it, in the first instance, had its attention been called to any defects.

It is always in order for a defendant to waive service of process, and submit himself to the jurisdiction of the court on either a civil or criminal charge, if the court has jurisdiction of the subject-matter. See *State v. Fitzgerald*, 51 Minn. 534, 53 N. W. 799, as a case directly in point, and cases there cited. The authorities cited, to the effect that by pleading guilty the defendant admits the truth of the facts well pleaded in the accusations against him, are sound in the cases to which they apply; but they have no application in this case. In the cited cases, no offense was charged, or the acts charged did not constitute an offense. In the case at bar no contention is made that the acts themselves are insufficiently stated, or that the facts stated do not constitute an offense. An order to show cause is only a notice that a motion will be made at a time and place stated, and giving the

party named an opportunity to be heard in his own behalf, and the defendant in this case, without compulsion or arrest, appeared on the return day, and had his day in court, and he ought not to be heard to complain, after the imposition of the sentence, that he imposed upon the court. To permit him to do so is to allow him to take advantage of his own wrongful act.

For these reasons, I am of the opinion that the judgment of the district court in imposing sentence upon the defendant for willful contempt of that court should be affirmed.

(112 N. W. 52.)

STATE OF NORTH DAKOTA EX REL. A. W. MADDERSON, APPELLANT,
v. ANDREW F. NOHLE, R. B. GORE, JOSEPH STEPHEN, ACTING
AND BEING THE BOARD OF COUNTY COMMISSIONERS OF MCKENZIE
COUNTY, NORTH DAKOTA, RESPONDENTS.

Opinion filed June 14, 1907.

Prerogative Writ — Quo Warranto — Relation of Private Person.

1. Application is made to this court by a private relator for the issuance of a writ in the nature of quo warranto directing the defendants, who are acting as county officials of McKenzie county, to desist from exercising jurisdiction and authority over the territory included in such county, basing such application upon the ground of the unconstitutionality of chapter 73, p. 155, of the Laws of 1905. The application is resisted by the defendants and also by the Attorney General.

Held, following the rule announced in *State v. McLean county*, 11 N. D. 356, 92 N. W. 385, that such writs will only be issued by this court as prerogative writs, and will not be issued at the request of a private relator, except in very exceptional cases.

Same — Writ Discretionary — Public Policy.

2. *Held*, also, that the issuance of such writs by this court is wholly discretionary, and that applications therefore should be denied upon the grounds of public policy, where, as in this case, the issuance thereof would result in no perceivable benefit to the relator or to any other person, but would, on the other hand, result in great detriment to a large number of people, and would undoubtedly lead to much strife, confusion and litigation.

Application by the state, on the relation of John Frish, for writ of quo warranto to A. F. Nohle and others.

Writ denied.

Crawford & Burnett and Ball, Watson & Young, for relator.

T. F. McCue, attorney general; Robert Norheim, T. S. Becker and Geo. A. Bangs, for respondents.

FISK, J. This is an application for the issuance by the court of an original writ in the nature of quo warranto.

The application is made in the name of the state by one John Frish, a private person, as relator, and the object sought by such writ is to compel the defendants, who are acting as certain county officers of what is known as McKenzie county, to desist from exercising jurisdiction and authority as such county officials over the territory embraced within the limits of such county; relator's contention being that no such county legally exists, for the reason that the law under which the same was attempted to be organized, being chapter 73, p. 155, of the Laws of 1905, is unconstitutional and void, as being in violation of section 167 of the Constitution, which, it is claimed, prohibits special legislation upon the subject of the organization of counties. Upon the presentation and filing of the application, an order was made and served upon defendants requiring them to show cause before this court why such writ should not be issued as prayed for. Pursuant to such order to show cause, the defendants, through their counsel, have appeared and resist the issuance of such writ, both upon the ground that the relator has no right to institute the proceedings and also upon the merits. The facts as stipulated are briefly as follows: The defendants, Nohle, Bangs and Shaw, were in the month of April, 1906, appointed county commissioners in and for McKenzie county by the governor, and the defendants, Dimmick and Millhouse, were at said time appointed by the governor to the offices of treasurer and auditor, respectively, and that all such persons thereupon assumed the duties of their respective offices and acted as such officers until January 7, 1907; that all of said officers except the defendant Shaw, who was succeeded by one R. B. Gore, were, at the general election held in November, 1906, in said county, elected to the respective offices to which they had been theretofore appointed, and they each duly qualified and entered upon the discharge of their duties on January 7, 1907, since which time they have been the qualified and acting officers aforesaid. Said officers have performed all the duties usually performed by such county officers, and that during the year 1906 taxes were assessed, levied, and collected in said county and the portion thereof belonging to the

state has been turned over by the treasurer of said county to the state in the same manner as taxes are collected and turned over by regularly organized counties; that since the organization of such county roads have been established, indebtedness created, and county warrants issued; that there is now outstanding approximately \$5,000 of such warrants, which are held by divers persons who have taken them in the ordinary course of business; that upon the passage and approval of chapter 73, p. 155, of the Laws of 1905, the governor established a temporary county seat for said county at Alexander, where all county business has been transacted as in other regularly organized counties; that in May, 1906, an action was instituted in the district court of Stark county by one J. Granteer on behalf of himself and several others, challenging the validity of the organization of such county, and in the month of November, 1906, an action was instituted in the federal court, Southeastern division, by the Northern Pacific Railway company for the same purpose, which actions are still pending and undetermined; that the relator, Frish, is a resident and property owner in said territory.

We are clearly of the opinion that the application should be denied. By granting the same we would recognize the right of a mere private relator to invoke the original jurisdiction of this court in a matter in which he shows no greater interest than that of any other resident and property owner of the county, and this, without first invoking the jurisdiction of the district court, properly having jurisdiction in such cases. It has repeatedly been held by this court that the writ here prayed for is strictly a prerogative writ, and that the same will be issued only in exceptional cases. *State v. McLean County*, 11 N. D. 356, 92 N. W. 385, and cases cited. In that case this court quoted approvingly from the opinion of the Supreme Court of Utah, in *State v. Elliott*, 44 Pac. 248, 13 Utah 200, as follows: "It will be noticed that there are five writs of which the Supreme Court has original jurisdiction, and very probably many controversies will arise for which one or the other of these writs will afford a proper remedy. Hence, if we were to assume jurisdiction of every such controversy which might be brought before us, regardless of whether the state had a special interest therein, or whether it presented any special exigency, it can readily be perceived that most of our time would be consumed in hearing and determining cases which could more speedily and conveniently be heard and determined in an inferior court. This would seriously impair the usefulness of

this tribunal as an appellate court, and yet its appellate power was the main object of its creation. No construction which would render such a result possible is warranted by the provisions of the constitution relating to the judicial department. From the general policy indicated, and the language used, it is manifest that this tribunal was intended by the framers of the constitution to be essentially a court of appeals; and therefore we will not assume jurisdiction, under the grant contained in section 4 at the relation of private parties, except in cases which present some special reason or some special or peculiar emergency, or where the interests of the state at large are shown to be such as to render it apparent that the interests of justice require its exercise. The remedy provided by the constitution, authorizing proceedings in inferior tribunals, must in all cases be followed, unless it shall be made to appear to the satisfaction of this court that there is an urgent necessity for the interposition of its power, where, as in this case, the appellate court of the state and inferior courts of general common-law powers are vested with jurisdiction in quo warranto, the appellate court may properly refuse to assume original jurisdiction in matters where the inferior courts have ample power and can by entertaining the information, afford adequate relief; and the right of the appellate court to exercise its discretion in granting or withholding leave to file an information in the nature of quo warranto is not limited. Nor is the discretionary power of the court exhausted until it has permitted the information to be filed." The rule thus adopted by this court is clearly sound, and will be strictly adhered to by us as a settled rule of practice in disposing of applications such as the one now under consideration. The fact that the attorney general indorsed upon the moving papers his consent to the exercise of such jurisdiction by this court will not operate to change the above rule. The very able and exhaustive opinion of Mr. Chief Justice Wallin in *State v. McLean County*, *supra*, is to our minds, a conclusive answer to the arguments of relator's counsel, not only upon the practice question here involved, but upon the merits as well. In the opinion in that case, after referring to the facts, it is, among other things, said: "Upon the considerations already stated, we are in our judgment justified in refusing to assume original jurisdiction in these cases. But there is another factor of prime importance, and one relating to the merits of the application, which, in our opinion, leads to the same conclusion. In these cases the remedy of quo warranto is not sought as a means of exercising superintending control of an inferior

court, or in aid of the appellate jurisdiction of this court. On the contrary, the relator is before this court with the avowed purpose of invoking its original powers. In such cases it has been repeatedly held the enumerated writs are not writs of right, but are strictly prerogative writs, and the same will issue only in cases publici juris, where the sovereignty of the state, or its franchises and prerogatives, or the liberties of its people, are directly, and not remotely, involved. * * * Ordinarily a private person, who volunteers as a champion of only public rights, and as such invokes the prerogative writs, will be regarded as an intermeddler. It appears by the information, and more fully by the briefs of counsel on behalf of the relator, that the relator has suffered no wrongs peculiar to himself, but on the contrary, the relator appears in this court solely as a champion of the state, and for the ostensible purpose of protecting governmental franchises from abuse. * * * Before assuming jurisdiction of these cases, it is, in the opinion of this court, very important to consider the consequences which will necessarily ensue if the relief asked by the relators is granted by this court; and this more especially in view of the entire want of power in this court either to rehabilitate the political machinery sought to be destroyed, or to create a new governmental status within the extensive regions which would be affected if the relief asked were granted." The foregoing opinion is as applicable to the facts of this case as to those in the case then under consideration, and we unhesitatingly give our assent to all that was there held. The fact that the relator in the case at bar made his application for the writ within two years from the date of the passage of the act in question does not, in our opinion, under the facts, exonerate him from the charge of laches. Relator does not attempt to excuse the delay of nearly two years in making his application. The stipulated facts do not show that he was a party to the other proceedings instituted for the purpose of adjudicating the question as to the validity of such county organization nor that he had knowledge of such proceedings.

In applying the doctrine of laches or the rule of estoppel by acquiescence, no fixed time will be taken as controlling, but the facts in each particular case must govern the court's decision, and where, as in this case, although but about two years have elapsed since the county was organized, grave consequences would inevitably follow to a large number of people as a result of relator's successful prosecution of the proceedings, and no perceivable benefit to any person

would be obtained thereby, this court is justified, if not required, by the plainest principles of jurisprudence to deny the relief prayed for by exercising its undoubted discretion to refuse the writ. A circumstance of no little weight is the fact that the attorney general is not before the court asking that the writ be granted but he has appeared in behalf of defendants and vigorously resists relator's application. Conceding the unconstitutionality of the law in question, as was done in *State v. McLean County*, supra, we hold, as we held in that case, that it would be a gross abuse of the discretion lodged in this court in such cases to grant the relief prayed for, "and thereby precipitate the governmental chaos which would immediately and certainly result from such action." The Supreme Court of Illinois in *McCormick v. Kreinke*, 179 Ill. at page 308, 53 N. E. 549, in disposing of a similar question in which relator had waited three years before making application, held to the same effect. To grant the relief which relator asks would, in our opinion, unnecessarily open up an indefinite field of strife, confusion, and litigation without any corresponding benefits to relator or any other person, and as was said in *State v. Des Moines*, 65 N. W. 818, 96 Iowa 521, 31 L. R. A. 186, 59 Am. St. Rep. 381, "the law does not demand such a sacrifice for merely technical reasons." It follows that the application should be denied, and it is so ordered.

MORGAN, C. J., concurs.

SPALDING, J. I concur in that part of the foregoing opinion, holding that the record does not disclose such exceptional facts as to warrant this court in issuing the writ requested on the relation of a private relator, but am of the opinion that a case showing most extraordinary circumstances should be presented to justify a court in holding that a statute conceded to be invalid can in effect be validated by the laches of either the sparse population of a large territory, or state officials who have no constitutional authority to bind either the state or the county in such a matter. The fact that three or four months after the only election held in a county organized under an unconstitutional statute before a proceeding to determine its status was commenced does not, in my opinion, justify a finding of such laches as are necessary to put life into a statute void ab initio.

In my opinion the facts in this case are entirely inadequate to make the doctrine of *State v. McLean County*, 11 N. D. 356, 92 N. W. 385, applicable.

(112 N. W. 141.)

A. H. ANDERSON AND O. B. JORGENSEN, CO-PARTNERS AS ANDERSON & JORGENSEN, v. H. C. JOHNSON.

Opinion filed May 4, 1907. Rehearing denied June 6, 1907.

Brokers — Commission — Ability to Convey Title.

1. Under a contract whereby defendant agreed to pay plaintiffs a commission of \$100 for obtaining the sale to him of certain real property at a stated price, it is incumbent upon plaintiffs, in an action to recover such commission, to prove that the person produced as such owner of the property was willing to sell at such stated price and also that such person was able to convey a merchantable title to defendant.

Trial — Directing a Verdict.

2. Whether or not such a contract as the one stated in the complaint was in fact entered into was, under the evidence, a question for the jury, and it was therefore error to direct a verdict in plaintiffs favor.

Appeal from District Court, Sargent County; *Allen, J.*

Action by Anderson & Jorgenson against H. C. Johnson. Judgment for plaintiffs and defendant appeals.

Reversed.

Purcell & Divet, for appellant.

In the absence of stipulations to the contrary, a contract to sell land implies a marketable title. *McLaughlin v. Wheeler*, 47 N. W. 816; *Loan Co. v. Thompson*, 5 So. 473; *Roberts v. Kimmons*, 3 So. 736; *Greusel v. Dean*, 67 N. W. 275; *Garnhart v. Rentchler*, 72 Ill. 535.

O. S. Sem, for respondents.

If the seller closed a sale to the broker's customer on any terms, the broker's commission is earned. *Ward & Murray v. McQueen*, 13 N. D. 153, 100 N. W. 253; *Hubachek v. Hazzard et al.*, 86 N. W. 426; *Mattes v. Engel et al.*, 89 N. W. 651; *Huntemer v. Arent*, 93 N. W. 653.

On sufficient evidence to sustain the decision, it is not error to direct a verdict. *McComb v. Bakerville*, 106 N. W. 300.

FISK, J. This litigation arose in justice's court and was appealed to the district court, where it was tried anew and judgment render-

ed in plaintiff's favor pursuant to a verdict directed by the court, from which judgment and from an order overruling defendant's motion for judgment notwithstanding the verdict or for a new trial, defendant has appealed to this court.

The cause of action upon which plaintiffs rely for a recovery is stated in their complaint, in substance, as follows: That at all the times hereinafter mentioned plaintiffs were real estate brokers, doing business at Milnor, N. D., under the firm name of Anderson & Jorgenson; that on or about May 1, 1902, the defendant agreed with plaintiffs that in the event plaintiffs were able to procure the sale of certain real property (describing it) to defendant on terms acceptable to him, and offering his price at \$2,300, plaintiff's commission should be \$100, to be paid to plaintiffs by defendant at such time as plaintiffs procured a seller able and willing to sell on such terms; that plaintiffs did procure the owner of said land, one Christ Staiger, who was willing, ready, and able to sell, and who, in fact, did sell the same to defendant on terms acceptable to him on or about May 10, 1902, and that thereby defendant became indebted to them in the said sum of \$100, no part of which has been paid. The answer consists of a general denial. Under the issues thus framed it was incumbent on plaintiffs to show that they produced the owner of the property, and that he was willing, ready and able to sell and transfer to defendant a merchantable title thereto upon the terms stated, to wit, \$2,300. Did plaintiff show this? The undisputed evidence is to the contrary. While plaintiffs were permitted to prove statements made by Staiger to them as to his willingness to sell the property for \$2,300, which testimony was clearly incompetent as being merely hearsay, the undisputed evidence is that Staiger subsequently refused to sell for that sum, and that defendant finally entered into a contract with Staiger to buy and Staiger agreed to sell the property at the price, \$2,325. Not only did plaintiffs fail to prove their cause of action in this respect, but they offered no testimony whatever to show that this man Staiger whom they produced was able to furnish title to the property, and, furthermore, the testimony offered by defendant for the purpose of proving the contrary was, on plaintiff's motion, excluded by the trial court.

It seems to have been the theory of plaintiff's counsel, and also of the trial judge, that all it was necessary for them to prove, in order to recover, was the existence of the contract as pleaded, and that they produced the person claiming to own the property and who,

in fact, entered into a contract with defendant to sell the same to him upon some terms acceptable to defendant. In other words, even though Staiger was unwilling and refused to sell at the price of \$2,300, that, if defendant dealt with him on any other terms whatever, plaintiffs would still be entitled to their commission. If this be true, then it would follow that even if defendant, in order to purchase the property, was obliged to pay or agreed to pay Staiger \$2,400, plaintiffs would be entitled to still claim their commission of \$100. This is clearly erroneous. Plaintiffs must stand on their contract, and, in order to recover, they must show that Staiger sold the property to defendant, or at least was willing to do so, for \$2,300. What Staiger may have previously stated to plaintiffs as to his willingness to sell upon such terms is wholly immaterial, as well as incompetent. The undisputed evidence is that he afterwards refused to do so. Was defendant precluded from thereafter making the best bargain he could, and by doing so would he become obligated to the plaintiffs to pay them the agreed commission which under the contract was to be paid only on condition that they were able to get him the property at \$2,300? Clearly not.

Counsel for respondents, as well as the trial court, also seem to have labored under the false impression that the commission was earned when plaintiffs produced the owner who was willing, although unable, to sell to defendant. We think it was clearly erroneous to reject defendant's offered proof tending to show Staiger's inability to transfer title to defendant, as, under the allegations of the complaint, such commission was to be paid only upon condition that plaintiffs produced a person who was willing, ready, and able to furnish to defendant a title to the property upon the terms mentioned. Surely it cannot be successfully contended that, under a contract such as the one stated in the complaint, the commission would be earned by bringing to the defendant a person claiming to be the owner, but who, in fact, had no title, and who nevertheless is willing to enter into a contract agreeing to sell and transfer title. This is to our minds too plain for discussion.

What we have above stated is upon the theory that there was, in fact, a contract between the parties for the payment of a commission as alleged in the complaint. But we are convinced that under defendant's showing it was at least a question for the jury to say whether or not such a contract was ever made. As we construe defendant's testimony, he flatly denied the same. According to his

version of the transaction, as gathered from his entire testimony, the plaintiffs, instead of being in his employ, were acting for Staiger, and defendant made them an offer of \$2,400 for the property, and through a secret understanding between them they were to communicate and did communicate such offer to Staiger on the basis of \$2,300, and it was understood between them that, if the latter sum should be accepted by Staiger, plaintiffs were to pocket the \$100 without informing Staiger thereof. It appears that plaintiffs were to receive some compensation from Staiger, but whether they in fact received any, and if so, how much, is not disclosed, nor is it material. If these are the facts, then plaintiffs owed Staiger the duty of exercising towards him the utmost fairness, and they were in duty bound to disclose to him the exact offer made by defendant. Failing to do so, any sum received by them from defendant would belong to Staiger; but, in any event, such facts are inconsistent with and go to disprove the cause of action stated in the complaint, and for this reason it was error to direct a verdict in plaintiffs' favor.

Appellant asks for judgment notwithstanding the verdict or for a new trial. We are agreed that the latter portion of his motion should have been granted, and for the error in denying it the judgment and order appealed from must be reversed and a new trial ordered, with costs to appellant. All concur.

(112 N. W. 139.)

STATE OF NORTH DAKOTA v. HERMAN H. SEELIG.

Opinion filed June 13, 1907.

Intoxicating Liquors — Illegal Sale — Instructions.

In a prosecution for selling intoxicating liquor as a beverage, contrary to law, the only question in dispute was as to whether the beverage sold was beer or malt; the state claiming it was beer, and the defendant claiming it was malt. The undisputed evidence shows that if malt, it was not intoxicating. *Held* error for the trial court to instruct the jury upon the theory that they might convict if they found that the liquid sold was either malt or any other compound or mixture, if it contained the alcoholic principle and could reasonably be used as a beverage and as a substitute for the ordinary intoxicating liquors.

Appeal from District Court, Cass County; *Pollock, J.*

Herman H. Seelig was convicted of selling intoxicating liquors, and appeals.

Reversed.

J. F. Callahan, for appellant.

T. F. McCue, attorney general, and *W. H. Barnett*, state's attorney, for the State.

FISK, J. Defendant was convicted in the district court of Cass county in November, 1905, of the crime of selling intoxicating liquors to be drank as a beverage, contrary to law. He thereafter moved for a new trial, basing the motion solely upon alleged errors of law in the instructions to the jury, which motion was denied, and from a judgment entered pursuant to the verdict of conviction he has appealed to this court. The assignment of errors relates solely to the correctness of the instructions of the court to the jury, and principally to that portion thereof relating to the definition of "intoxicating liquors." The prosecution elected to rest its case upon specific sales made by defendant to the witness W. G. Scanlon on or about August 9, 1905. This witness testified that on said date, he purchased from defendant, in his place of business, numerous bottles of beer, all of which, except one, he drank upon the premises. The defendant did not deny these sales, positively, but contended that, if he sold any liquor to Scanlon, the same was malt, and not beer, to the best of his knowledge. By the charge of the court, the jury, under this state of the record, was properly restricted to a consideration of the specific sales to Scanlon, and the only question, therefore, for the jury to determine, was as to whether or not the liquor sold to Scanlon, if any was sold, was beer or malt. If malt, he was entitled to an acquittal, as there was no proof that malt was intoxicating. In fact, the undisputed testimony showed to the contrary. On the other hand, if it was beer, as contended by the prosecution, then defendant was guilty, as the trial court properly charged; beer being a malt liquor and intoxicating.

It is conceded by the defendant that a bottle claimed to have been purchased by the witness Scanlon from him contained beer, and it is not disputed that a certain bottle, which was identified as Exhibit D, was found upon a search of defendant's premises by the deputy sheriff, and that it contained beer. Defendant insists, however, that, if any beer was on his premises, it must have been placed there by his clerk, without his knowledge, and that it was not kept there for sale. There was no claim made that the liquid purchased by the witness Scanlon was anything other than beer or malt, and hence

the instructions to the jury should have been limited accordingly; but the record discloses that the learned trial court, after properly instructing the jury with reference to the statutory definition of "intoxicating liquor," entered into a lengthy discussion of the law relating to the method of determining the intoxicating nature of mixtures, under other names, which contain the alcoholic principle, and which may reasonably be used as a beverage and as a substitute for the ordinary intoxicating liquors; this, notwithstanding the fact, as before stated, that under the proof submitted the liquor sold was either beer or malt, the former being intoxicating under the express provision of our statute, and the latter being nonintoxicating under the undisputed proof in the case. Among other things, the jury was told, in effect, that it was for them to say whether or not the liquor sold to the witness Scanlon was intoxicating within the meaning of the law, and they were told, in effect, that if it was malt it was still for them to decide whether it had in it the alcoholic principle as a distinctive force, and whether such compound or mixture was reasonably liable to be used as an intoxicating beverage, and, if so, it was within the statute, and they should find it to be intoxicating, etc. These instructions were entirely foreign to the facts in the case at bar, and were palpably erroneous, under the condition of the proof in this case, and were well calculated to confuse, if not mislead, the jury.

The argument of counsel for respondent, to the effect that the verdict of "guilty," returned by the jury, conclusively shows that the jury found that it was beer, which defendant sold to the witness Scanlon, would be sound, were it not for the instructions which were predicated upon the theory that the jury might find that it was not beer, but was malt, or some other compound or mixture which was sold, and still find a verdict of guilty. Counsel for respondent call attention to the fact that the charge to the jury is almost verbatim like the language used by Judge Brewer in his opinion in *Intoxicating Liquor Cases*, 25 Kan. 757, 37 Am. Rep. 284; but the complete answer to this is the fact that, in the Kansas case, the defendant was prosecuted for selling compounds and mixtures containing the alcoholic principle, such as essence of lemon, bay rum, McLean's cordial, prickly ash bitters, etc., and Judge Brewer, in writing his opinion in the case, was, of course, dealing with the particular facts of that case, which, as we have seen, are entirely different from the facts in the case at bar.

It follows from what we have above stated that the judgment must be reversed and a new trial ordered. All concur.

SPALDING, J., disqualified. TEMPLETON, J., sitting by request.
(112 N. W. 140.)

E. A. SHEETS v. W. B. PROSSER.

Opinion filed May 3, 1907.

Action — Joinder of Causes — Claims Out of same Transaction.

1. A cause of action for equitable relief from a forfeited mechanic's lien may be joined with a cause of action to recover the penalty imposed by the statute for failing to release the lien on demand.

Quieting Title — Forfeited Mechanic's Lien.

2. Equity will remove a cloud upon the title caused by the record of a mechanic's lien which has become forfeited by the lien claimant's failure to institute foreclosure proceedings upon demand, under section 4797, Rev. Codes 1899, (section 6246, Rev. Codes 1905.)

Same — Conditions Precedent.

3. Payment of the debt for which the lien was claimed will not be required as a condition to such relief

Statutory Penalty — Pleading.

4. In an action to recover a statutory penalty, the complaint must clearly indicate the statute by virtue of which the penalty is claimed.

Mechanic's Lien — Penalty for Failure to Release on Demand — Costs of Release.

5. In action to recover the penalty imposed by section 4799, Rev. Codes 1899, for failure to discharge mechanic's lien of record, the complaint must state that the release which the lien claimant was notified to execute could have been executed by him without expense.

Same — Pleading.

6. A recital of the contents of a written notice, which the complaint alleges was served, is not equivalent to a direct allegation that the facts were as stated in such notice.

Appeal from District Court, Nelson County; FISK, J.

Action by A. E. Sheets against W. B. Prosser. From an order overruling a demurrer to the complaint, defendant appeals.

Modified.

Frich & Kelley, for appellant.

Uniting action to quiet title with one for a forfeiture is a misjoinder. Rev. Codes 1905, section 6877; *Jasper v. Hazen*, 2 N. D. 401, 51 N. W. 583, 23 L. R. A. 58.

Where plaintiff's bill to quiet title shows a valid interest in the defendant it is demurrable. 17 Enc. Pl. & Pr. 336. Sub. Div. 5, Id. 340.

Failure to foreclose a lien upon demand to do so, destroys not the lien, but the remedy; and when seeking to quiet title against the lien, plaintiff's bill must show offer to do equity or it is demurrable. 16 Cyc. 140 (M), note 64; Id. p. 141; *Walsh v. Braman*, 43 N. E. 597; *Railway Co. v. Gurley*, 47 S. W. 513.

One seeking to recover a penalty or forfeiture, must count upon the statute affording it. Rev. Codes 1905, section 7396; *Greenberg v. Union Natl. Bank*, 5 N. D. 483, 67 N. W. 597; *Erickson v. Citizens Natl. Bank*, 9 N. D. 83, 81 N. W. 46; 18 Am. & Eng. Enc. Law (1st Ed.), 278.

Failure of one demanding satisfaction of lien to provide for cost destroys his claim. *Dunkin v. Mutual Ben. L. Ins. Co.*, 63 Mo. App. 257.

Complaints in such cases are construed with the strictness applied to indictments. *Prigmore v. Thompson*, 1 Minor 420; *Levy v. Cohen*, N. Y. S. 912; *State v. Williams*, 8 Tex. 255; *Ferrett v. Atwell*, 1 Blatch. 151; *People v. Ins. Co.*, 72 Ill. App. 569.

Scott Rex, for respondent.

The actions to quiet title and to recover the statutory penalty "arise out of the same transaction" and are properly joined. Sec. 6877, Rev. Codes 1905; *Bush v. Froelick*, 66 N. W. 939; *Tripp v. City of Yankton*, 74 N. W. 447; *Pomeroy Remedies* 463, 475; *Sternberger v. McGovern*, 56 N. Y. 12; *First Div. St. P. & P. R. Co. v. Rice*, 25 Minn. 278; *Gertler v. Linscott*, 26 Minn. 82; *Humphrey v. Merriam*, 37 Minn. 502.

Failure to foreclose lien upon demand forfeits it. *Jones & McGee Lumber Co. v. Boggs*, 19 N. W. 678.

SPALDING, J. The plaintiff seeks in this case to recover upon two causes of action. He first alleges that defendant filed a mechanics lien upon certain real property of which he is the owner in Lakota, Nelson county, N. D.; that on the 13th day of June, 1904, he served

defendant personally with a notice and demand in writing, under and pursuant to provisions of section 4797, Rev. Codes N. D. 1899, whereby defendant was notified and required to commence suit to foreclose his lien; that defendant wholly failed to commence such suit within 30 days after service of such notice, or at all; and that plaintiff's title to such real estate is clouded thereby. For his second cause of action he realleges that the allegations of the first cause, and then asserts that, more than 30 days after the service of the notice and demand that suit be commenced to foreclose defendant's lien, he caused to be served on defendant, on the 1st day of February, 1905, a notice and demand in writing requiring defendant, at plaintiff's cost and expense, to discharge such lien of record within 10 days, and the failure of defendant to discharge his lien. Copies of the notices referred to are attached to the complaint. Plaintiff demands the judgment and decree of the court, first, canceling and discharging defendant's mechanic's lien and removing the cloud caused thereby on plaintiff's property; second, that he recover of defendant the sum of \$100. The defendant demurred to the plaintiff's complaint as a whole because several causes of action were improperly united therein, and to each of the causes of action because neither stated facts sufficient to constitute a cause of action. The demurrer was argued in the district court and overruled, and defendant given 20 days in which to answer. He did not answer, but appealed from the order overruling his demurrer.

Section 5291, Rev. Codes 1899, provides that "the plaintiff may unite in the same complaint several causes of action, whether they are such as have been heretofore denominated legal or equitable, or both, when they arise out of (1) the same transaction, or transactions connected with the same subject of action, * * * but the causes of action so united must all belong to one of these classes * * * and must be separately stated." Section 4797, Rev. Codes 1899, requires the holder of a mechanic's lien to commence suit to foreclose within 30 days after demand of the owner that he do so, and provides in case of failure that "the lien shall be forfeited." Section 4799 provides that, when more than 30 days have elapsed since service of demand to commence suit without the commencement of an action to enforce the lien, the holder thereof shall, upon demand and upon payment of the expenses thereof, discharge the same either on the proper book or in the same manner as

the satisfaction of a mortgage, and in case of neglect to do so for 10 days shall forfeit \$100 to the person entitled to such discharge, etc.

While there has been much written in attempts to settle what causes of action may be united under the code, it still seems left to determine the application of the statute upon the facts of each case, and it appears to us that the transaction or transactions in this case were the demand and notice by plaintiff and failure by the defendant, that the failure of defendant to release the lien constitutes both causes of action, and that both causes of action proceed from the same wrongs. *Bush v. Froelick*, 8 S. D. 353, 66 N. W. 939; *Tripp v. Yankton*, 10 S. D. 516, 74 N. W. 447; *Montgomery v. McEwen*, 7 Minn. 351 (Gil. 276); *First Div. v. Rice*, 25 Minn. 278; *Humphrey v. Merriam*, 37 Minn. 502, 35 N. W. 365; *Pomeroy's Remedies*, sections 463-475; *Sternberger et al. v. McGovern*, 56 N. Y. 12. In *Montgomery v. McEwen*, 7 Minn. 351 (Gil. 276), it was held that a cause of action for recovery of the amount due on a note given by the defendant to the plaintiff was properly joined in the same complaint with an equitable claim for delivering up and cancellation of a note and mortgage given by plaintiff to defendant, and that both causes of action grew out of and constituted parts of one entire transaction. We think the two causes of action were properly joined.

The defendant argues, on the demurrer as applied to the first cause of action, that the plaintiff in his complaint has shown a valid interest in the defendant in the property concerned, and that therefore he cannot maintain an action to remove the cloud. The fallacy in this is that this is not what the plaintiff shows. He shows that, while defendant may at one time have possessed a valid lien, by failure to commence an action to foreclose he has forfeited such lien. What does the statute mean when it says that in such event "the lien shall be forfeited?" In plain English the word "forfeit" means to lose, and this is its legal meaning in this connection. Something lost is gone, not now possessed, and this forfeiture is self-executing. The lien ceased to exist by reason of the neglect or failure of defendant to foreclose it. However, the record evidence still remained, and constituted a cloud, and some proceedings became necessary to make the record show that there was no longer such lien against defendant's property. Defendant argues that there is an analogy between this case and one brought to quiet title by

a mortgagor on account of an unpaid mortgage barred by the statute of limitations, when the mortgagor brings an action to quiet title, and the courts hold that he must pay the debt before he can maintain the action. We perceive no similarity. In that case the mortgage still exists. The law raises a presumption of payment, which the defendant may take advantage of by answer. Here, as we have shown, the lien no longer exists, but has gone, as completely as though paid in full. To deny relief from the void statement of what once was a lien, still on the records would be to treat as a valid lien that which the statute declares to be a nullity. We therefore think the first cause of action as stated in the complaint is good.

The demurrer to the second cause of action should have been sustained. If this was intended as a cause of action for the recovery of damages, there is no allegation that any damages were suffered. If, however, it is an attempt, as it appears to be, to recover the penalty imposed by section 4799, Rev. Codes 1899, the statute is not pleaded. An express averment that a recovery of the statutory penalty is sought is necessary. This court has so held in *Greenberg v. Bank*, 5 N. D. 483, 67 N. W. 597, and in *Erickson v. Bank*, 9 N. D. 86, 81 N. W. 46. In the first of the above cases Judge Bartholomew says that "this rule has so long been the law and is so universally accepted that we cannot disregard it." Section 7396, Rev. Codes 1905 (section 5787 Rev. Codes 1899), provides that in actions to recover forfeitures and penalties "it shall be sufficient to allege in the complaint that the defendant is indebted to the plaintiff in the amount of the forfeiture claimed according to the provisions of the statute which imposes it, specifying the section and chapter containing such statute." This is a relaxation of the ancient rule, which required the full statute to be set out in the pleading; but this complaint fails to refer to the statute even by section and chapter, which it should at least do.

There is yet another reason why the demurrer to this cause of action is good. As a condition precedent to the right to recover the penalty, section 4797, quoted above, requires the payment of the expenses for the discharge. The complaint contains no allegation of such payment, or of any equivalent act. The assertion that the demand required defendant to execute a release of the lien at the cost and expense of plaintiff does not comply with the requirements of the statute, and does not amount to an allegation that such cost and expense had been paid or provided for.

The cause will be remanded, with directions to vacate the order appealed from and enter a new order in conformity with this opinion. The appellant will recover his taxable costs on this appeal. All concur.

FISK, J., being disqualified in this case, Judge TEMPLETON, of the First judicial district, sat by request.

MORGAN, C. J. (dissenting in part). I concur in the result, but I do not agree with the conclusion on the first ground of demurrer to the second cause of action that the Greenburg case, 5 N. D. 483, 67 N. W. 597, controls this case. In this case the complaint, construed in connection with the exhibits attached to and made a part of the complaint, states that the plaintiff seeks to recover \$100, "the penalty provided by law," on account of the failure of the defendant to discharge the lien after having been required to do so after compliance by the plaintiff with all the statutory requirements necessary to be performed before the defendant can be made liable for the penalty. The facts are, therefore, not the same as in the Greenburg case. All the facts essential to a statement of a cause of action for the recovery of the penalty are stated. The mere failure to specify what section of the statute the penalty is claimed under is not material in view of the allegations of the complaint and exhibit attached, that \$100 is claimed "as the penalty provided by law" for the refusal to discharge the lien. There is but one section of the code that provides for that penalty. The complaint is not framed under section 4799, Rev. Codes 1899, but states all the facts constituting the cause of action. It is not incumbent upon a pleader to state his cause of action under that section. That section provides for a statement in short form by counting upon it, but if the pleader states all the facts, giving rise to his cause of action for the recovery of the penalty, a cause of action is stated.

(112 N. W. 72.)

GEORGE SCHLOSSER v. C. S. MOORES.

Opinion filed May 4, 1907.

Seed Liens — Different Kind of Seed Furnished.

1. Whether, under the seed lien law of this state, a person furnishing two or more kinds of seed grain to another under one entire contract may perfect a lien which will be effective upon all the crops

produced from the seed thus furnished for the entire purchase price thereof, not determined.

Same.

2. Plaintiff, under a verbal contract sold and delivered to S. 200 bushels of seed wheat at 75 cents per bushel and 60 bushels of seed flax at \$2 per bushel, and filed one lien statement for the total purchase price, claiming a lien indiscriminately upon the crops produced from such seed for the entire amount due him under the contract, but stating the number of bushels of each kind of grain and the price per bushel. *Held*, that the contract is not entire, but is divisible, and that plaintiff's lien is therefore divisible, and should be construed as two liens; one upon the wheat for the value of the wheat seed furnished, and the other upon the flax for the value of the flax seed furnished.

Same — Lien Whether Seed is Sown or Not.

3. Under the seed lien statute of this state (sections 6271, 6272, Rev. Codes 1905), a person who in good faith furnishes seed grain to another is entitled to a lien for the entire purchase price of such seed upon the crop produced therefrom, whether all of such seed is sown or not.

Same — Directing Verdict — Conversion.

4. When plaintiff rested his case the trial court directed a verdict in defendant's favor. *Held* error, as plaintiff's proof showed that he had a valid and subsisting lien upon the property described in the complaint, and that defendant had converted the same.

Appeal from District Court, Steele County; *Pollock*, J.

Action by George Schlosser against C. S. Moores. Judgment for defendant, and plaintiff appeals.

Reversed.

Styles & Koffel, for appellant.

Appellant has a valid lien on the whole crop of both flax and wheat for the whole contract price of seed for both. 20 Enc. Law (2nd Ed.) 286; *Hooven v. Featherstone*, 99 Fed. Rep. 180; *Dunlop v. Kennedy*, 34 Pac. 92; *Aurand v. Martin*, 58 N. E. 926; *Bowman Lumber Co. v. Newton*, 33 N. W. 377; *Lewis v. Saylors*, 35 N. W. 601; *Williams v. Judd-Wells Co. et al.*, 59 N. W. 271; *Meixell v. Greist*, 40 Pac. 1070; *North & South Lum. Co. v. Hegwer*, 42 Pac. 388; *Mulvane v. Chicago Lbr. Co.*, 44 Pac. 613; *Johnson v. Salter*, 72 N. W. 974; *Wakefield v. Latey*, 57 N. W. 1002.

Also for the whole of the seed furnished, whether sown or not. 20 Enc. Law (2nd Ed.) 347; Central Trust Co. v. Chicago R. Co., 54 Fed. 598; Neilson v. Iowa Eastern R. R. Co., 1 N. W. 434; Lee v. Hoyt, 70 N. W. 95; Hickey v. Collum, 50 N. W. 918; Burns v. Sewell, 51 N. W. 224; Stewart-Chute Co. v. Mo. Pac. Lumber Co., 44 N. W. 47; Weir v. Barnes, 57 N. W. 750; Woolsey v. Bohn, 42 N. W. 1022; Foster v. Dohle, 24 N. W. 208; Irish v. Pheby, 44 N. W. 438; Pomeroy v. White Lake Lbr. Co., 49 N. W. 1131; Bogue v. Guthe, 74 N. W. 588; Lemay v. Johnson, 35 Ark. 225; Knowles v. Sell, 21 Pac. 102.

C. S. Shippy, for respondent.

Appellant's lien attached to the crop produced from the particular kind of seed furnished, and not otherwise. This is supported by similar holdings in other classes of liens. Badger Lumber Co. v. Holmes, 62 N. W. 446; Byrd v. Cochran, 58 N. W. 127; Doolittle v. Plenz, 20 N. W. 116.

No valid lien can be acquired for seed furnished which is diverted to other than seeding purposes. Nash v. Brewster, 41 N. W. 105; Wallace v. Palmer, 30 N. W. 445.

FISK, J. Plaintiff, claiming to have a seed lien upon certain wheat described in the complaint, brought this action to recover damages for the alleged conversion thereof by defendant. A verdict was directed in defendant's favor by the trial court, and from an order denying plaintiff's motion for a new trial he appeals to this court, and assigns as error the rulings of the district court in directing such verdict and in denying the motion for a new trial.

The facts are not in dispute, and, briefly stated, are as follows: On or about April 13, 1902, plaintiff, under a verbal contract, sold to one Saunders 200 bushels of seed wheat at 75 cents per bushel and 60 bushels of seed flax at \$2 per bushel; such seed grain to be sown on the real property described in the complaint. On or about June 18, 1902, plaintiff filed in the proper office a verified statement for the purpose of perfecting a lien upon the crops produced from such seed, pursuant to the provisions of sections 6271, 6272, Rev. Codes 1905. This statement sets forth the number of bushels and the price per bushel of each kind of seed furnished, and in all other respects complies with the law, except that one lien is claimed for the entire purchase price of both kinds of seed upon the crops indiscriminately. Of the 200 bushels of wheat so furnished Saun-

ders seeded only about 94 bushels, and only about 75 bushels grew and produced a crop. It does not appear how much flax seed was sown. Certain payments were made and applied on the purchase price of this seed grain, leaving a balance unpaid of \$98.39. Of the crop of wheat produced by Saunders, defendant received into his elevator and converted about 200 bushels of the value, at the time of the conversion, of about \$130. The chief controversy between the parties arises over the construction to be given the so-called "seed lien statute" aforesaid, and the contract under which plaintiff furnished the seed, for the purchase price of which he claims a lien. The statute governing seed liens is as follows:

"Sec. 6271. Any person who shall furnish to another seed to be sown or planted on the lands owned or contracted to be purchased, used, occupied or rented by him, shall upon filing the statement provided for in the next section, have a lien upon all the crops produced from the seed so furnished, to secure the payment of the purchase price thereof.

"Sec. 6272. Any person entitled to a lien under this chapter shall within thirty days after the seed is furnished file in the office of the register of deeds of the county in which the seed is to be sown or planted a statement in writing, verified by oath, showing the kind and quantity of seed, its value, the name of the person to whom furnished, and a description of the land upon which the same is to be or has been planted or sown. Unless the person entitled to the lien shall file such statement within the time aforesaid, he shall be deemed to have waived his right thereto."

No question is raised as to the validity of plaintiff's lien, provided the contract under which the seed was sold is an entire, indivisible contract, and provided, also, that a lien may be perfected under the statute in question upon both kinds of crops indiscriminately to secure the purchase price of all the seed so furnished. The respondent's counsel contends, first, that the lien is invalid for the reason that under the statute, as he construes the same, a lien can be claimed only upon each specific kind of grain for the purchase price of the seed which produced such kind, and hence he argues that it is impossible to acquire a valid lien where two or more kinds of seed are sold under one entire contract; second, that, should it be held that the lien as filed is sufficient under the statute, it is divisible and must be construed as two liens, one upon the wheat for the purchase price of the seed wheat, and the other upon the flax for the purchase

price of the seed flax; and, third, that no valid lien can be acquired for a greater amount than the value of the seed grain actually sown and which actually produced a crop, and, if this be true, he contends that under the undisputed evidence sufficient payments had been made, so as to leave nothing due plaintiff under his lien at the date of the alleged conversion.

The first proposition advanced by respondent's counsel is not free from doubt, and counsel upon both sides concede their inability to find any authorities directly in point. Many cases may be found decided under statutes somewhat similar to the one here involved, such as statutes creating threshers', laborers', landlords', and mechanics' liens; but all, except perhaps the latter kind, are clearly different, in so far as the point here involved is concerned. The case of *Mitchell v. Monarch El. Co.*, 15 N. D. 495, 107 N. W. 1085, involving a thresher's lien, sufficiently illustrates such difference. Under the threshers' lien law, the thresher, upon compliance with the statute, is given a lien upon all the grain threshed by him, and it is unnecessary to state in his lien statement the kinds of grain threshed. Under the seed lien statute, it will be observed that not only the quantity, but the kind, of seed furnished must be stated, together with its value, the name of the person to whom furnished, and a description of the land upon which the same is to be or has been sown. It is argued by respondent's counsel that, because the kind of seed is required to be stated, it was the legislative intent that a lien could be claimed only upon each specific kind of grain for the purchase price of the seed which produced that kind, and he makes a very plausible argument in support of such contention; but we think this too narrow a construction to give this statute. We do not think the legislature had any such object in mind in enacting the second section of such law. This section prescribes what the lien statement shall contain, and we do not believe that the question as to whether an entire, indivisible lien may be acquired on several kinds of grain to secure the purchase price of several kinds of seed sold under one entire and indivisible contract was in the minds of the legislators at all when they enacted this section. Their object in enacting this lien statute, no doubt, was to encourage the sale of seed grain on time and to afford security for the purchase price thereof, not only as against the owner of the crops produced therefrom, but as against creditors of such owner and persons purchasing from him; and therefore it was the legislative intent, in requiring the

vendor of seed grain to set forth in his lien statement the various matters therein required to be stated, to prevent the privilege thus given such vendors from being used as a cover for fraud, as well as to impart notice to the public of the facts therein required to be stated. To this end such person is required to state the kind and amount of grain furnished, its value, etc., and to file such statement in the office of the register of deeds of the county, so that creditors and all persons dealing with the owner of the crop produced from the seed may have knowledge of the contract between the parties and the extent of the rights claimed under such lien by the vendor of the seed so furnished. *Kelly v. Seely*, 7 N. W. 821, 27 Minn. 385; *Aurand v. Martin*, 188 Ill. 119, 58 N. E. 926.

If we are correct in this, then the provisions contained in the second section furnish no light upon the point here involved. Neither does the other section furnish any light upon the question. It merely gives a lien upon all the crop produced from the seed so furnished. It apparently was not contemplated that several kinds of seed might be furnished under one contract, yet this may frequently be done; and in such a case, if the contract is entire and indivisible, the vendor of the seed, unless given a lien indiscriminately upon all the crops produced from the seed thus furnished, would be deprived of the statutory lien. Whether or not such result would follow it is unnecessary for us to determine in this case, as we hold that the contract in question is not entire, but is divisible, and should be construed as two contracts—one for the wheat, and one for the flax. We therefore refrain from expressing any opinion upon respondent's first proposition. However, upon this interesting question we call attention to some of the authorities decided under mechanic's lien statutes which are analogous to the statute in question (*Lavin v. Bradley*, 1 N. D. 297, 47 N. W. 384), and wherein it is held that a person who furnishes material for the construction of several distinct buildings upon separate and distinct lots or tracts under one entire contract may have a lien upon all the buildings and lots or tracts for the entire amount of such material. These decisions are based upon the proposition that, the contract being entire, the lien, which is a mere incident, is also entire. In other words, the contract of the parties determines the status of the security in so far as its divisibility or indivisibility is concerned. *Fullerton v. Leonard*, 3 S. D. 118, 52 N. W. 325; *Willamette Mills Co. v. Shea*, 24 Or. 40, 32 Pac. 759; 20 Am. & Eng. Enc. (2d Ed.)

286, and numerous cases cited; Boisot on Mech. Liens, section 173, and cases cited. See, also, note to *Wilcox v. Woodruff*, 17 L. R. A. 315, 61 Conn. 578, 24 Atl. 521, 1056, 29 Am. St. Rep. 222; *Phillips v. Gilbert*, 101 U. S. 721, 25 L. Ed. 833; *Sergeant v. Denby*, 12 S. E. 402, 87 Va. 206; *Phillips Mech. Liens*, section 369.

But we agree with respondent's counsel that the contract under which the seed was sold is divisible, and should be construed as two liens—once upon the wheat for the value of the seed wheat furnished, and the other upon the flax for the value of the seed flax furnished; hence the plaintiff cannot claim a lien upon the wheat crop for more than the purchase price of the seed wheat furnished, with interest. The contract stipulated the number of bushels and price per bushel of each kind of seed furnished, and the fact that the total purchase price is stated will not in our opinion make the contract entire and indivisible. *Nichols & Shepard Co. v. Charlebois*, 10 N. D. 446, 88 N. W. 80 and authorities cited. As stated in *Katz v. Bedford*, 1 L. R. A. 826, 19 Pac. 523, 77 Cal. 319: "Whether a contract is entire or severable depends, in general, upon the consideration to be paid, not upon its subject. If the consideration is single, the contract is entire; but, if the consideration is expressly or by necessary implication apportioned, the contract is severable." See, also, 7 Am. & Eng. Enc. L. (2d Ed.) 95-97; *Pierson et al. v. Crooks et al.*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831; *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248; *Miner v. Bradley*, 22 Pick. (Mass.) 457; *Young, etc., Co. v. Wakefield*, 121 Mass. 91; *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734, 736; *Johnson v. Johnson*, 3 B. & P. 162; *Higham v. Harris*, 108 Ind. 246, 8 N. E. 255. The foregoing authorities all support the rule that when different articles are bought at the same time for distinct prices, although they are articles of the same general description, the contract is not entire, but is, in effect, a separate contract for each article sold. *Pierson et al. v. Crooks et al.*, *supra*, involved a contract for the sale of two descriptions of iron, hoops, and sheets, the quantity, quality, and price of each being specified, and *Andrews, J.*, said: "The point that the contract was entire and indivisible, and that the plaintiffs could not accept the sheets and reject the hoops, is based upon the general rule of law that where a contract is entire, though it may embrace the performance of several things, if one of the parties professes to deny its obligation upon him, or to rescind it on the ground that the other party has failed to perform its obligation on his part, he must renounce or rescind it in toto.

There was, indeed, one contract, in the sense that there was but one instrument embracing both descriptions of iron; but the two kinds of iron were distinct in character, and the prices were different and specific for each kind. There is nothing upon the face of the contract or in the evidence to indicate that the price of one kind was fixed with reference to the price of the other, or that the acceptance of both kinds was a consideration for the undertaking by the defendant to deliver iron of either kind. * * * Whether the contract was entire in the sense claimed depends upon the intention. We think, under the circumstances, it was properly held to be divisible." In *Johnson v. Johnson*, supra, two parcels of real estate were purchased by plaintiff at the same time and he took one conveyance for both. One was purchased for £700, and one for £300. The title to one was invalid, and plaintiff brought the action to recover back the consideration paid for it. He was allowed to recover. Lord Alvanley, in giving judgment, said: "My difficulty has been how far the agreement is to be considered as one contract, for the purchase of both sets of premises, and how far the party can recover so much as he has paid by way of consideration for the part of which the title has failed, and retain the other part of the bargain.

* * * Although both pieces of ground were bargained for at the same time, we must consider the bargain as consisting of two distinct contracts, and that the one part was sold for £300, and the other for £700."

The cases relied upon by appellant's counsel, in which it is held that the contracts are entire, and hence that a lien may be claimed upon several buildings for the entire cost of erecting all, will be found upon examination to involve contracts in which the quantity and value of the material for each building was not separately stated, but one gross sum was agreed upon as the consideration for all. Hence these authorities are not in point upon the question here involved. Had the contract in the case at bar merely stated the gross purchase price, instead of mentioning the price of each kind of grain, an entirely different case would have been presented.

Counsel for respondent next contends that plaintiff is only entitled to a lien for the price of the seed grain which was actually sown and which actually produced the crop. This contention must be overruled. We think it clear, under the statute in question, that a person who furnishes seed grain to another to be sown upon certain land is entitled, upon compliance with the statute, to a lien for the

purchase price of all seed so furnished upon the crop grown from such seed or any portion of such seed. In other words, it is not incumbent upon the vendor of the seed to see to it at his peril that all such seed is actually sown as agreed. As before stated, our seed lien law is analogous to mechanic's lien statutes, and the authorities are numerous under the latter statutes holding that the material man is not required at his peril to see that all the material is actually used in the building, and, whether it is actually used therein or not, he is entitled to a lien for the materials furnished. 20 Am. & Eng. Enc. L. (2d Ed.) 347, and cases cited.

At the close of plaintiff's testimony, the trial court, on motion of defendant's counsel, directed a verdict in defendant's favor. The plaintiff's proof showed that he held a lien upon the wheat mentioned in the complaint for a balance due him on the purchase price of the seed wheat furnished. It also showed that the defendant received into his elevator about 200 bushels thereof, worth a sum in excess of the balance due on plaintiff's lien, and converted the same to his own use; hence plaintiff was entitled to recover, under his showing, damages to the extent of such balance due him for the seed wheat furnished, and it was error for the trial court to direct a verdict.

The order appealed from is accordingly reversed, and a new trial ordered. All concur.

(112 N. W. 78.)

STATE FINANCE COMPANY v. A. N. BOWDLE, DEFENDANT, AND
VALERIA R. MYERS, APPELLANTS.

Opinion filed May 4, 1907.

Taxation — Assessment of Separate Tracts as One.

1. An assessment of one tract of land, comprising two smaller tracts owned by different persons whose titles are of record, is a nullity.

Same.

2. Each tract of land owned by different parties whose titles are of record must be separately assessed.

Same — Quieting Title — Tender of Taxes.

3. Where a tract of land, comprised of smaller tracts owned by different parties whose titles are of record, is assessed in a body in the name of one of the separate owners only, the assessment is inherently defective, and no tender of the taxes justly due is essential to the maintenance of an action to quiet title.

ChamPERTY — Examination of Title.

4. A deed is not void or champertous, under section 8733, Rev. Codes 1905, where an attorney for the grantee examines the records before the deed is given and discovers defects in tax deeds of record on which title is claimed.

Deeds — Construction — Effect of Recitals.

5. A clause in a quitclaim deed to the effect that the grantor makes no representations as to his title is not a disclaimer of title, nor does it show a prior abandonment of the land.

Taxation — Assessment — Correction — Statutory Provisions.

6. Section 96, c. 126, p. 292, Laws 1897, and section 92, c. 132, p. 376, Laws 1890, do not apply to division of valuations, where no transfer of the land has been made after assessment of taxes

Same — Curative Acts.

7. Chapter 166, p. 232, Laws 1903, does not apply to jurisdictional defects in assessments of real property.

Appeal from the District Court, Stutsman County; *Glaspell, J.*

Action by the State Finance Company against Valeria R. Myers and others. From a judgment in favor of plaintiff certain defendants appeal.

Affirmed.

Marion Conklin, for appellants.

Wicks, Paige & Lamb, for respondent.

MORGAN, C. J. This is an action to determine adverse claims to 80 acres of land in Stutsman county. Plaintiff alleges its absolute ownership of the land, and the defendant claims some interest or estate therein adversely to plaintiff. The relief demanded is in the statutory form prescribed by chapter 5, Laws 1901. The defendant Bowdle did not answer. The defendants Beck and Myers answered separately. The defendant Beck claims title as follows: (1) Under a sheriff's certificate of sale issued under the "Woods Law," dated November 21, 1898, for the taxes for the years 1892 and 1893. (2) Under a tax deed dated December 17, 1898, under a sale in 1895 for the tax of 1894. (3) Under a tax deed dated January 11, 1901, under the tax sale of 1897 for the taxes of 1896. (4) Under a tax deed dated January 11, 1901, under the sale of 1897, for the taxes of 1896. The defendant Myers in his answer claims title to the land under a tax deed dated June 25,

1903, under the sale of 1898, for the taxes of 1897. The trial court made findings of fact and conclusions of law to the effect that the plaintiff was the owner of the land, and that the defendants had no right, title or interest thereto. Judgment was entered on the findings, and the defendants Beck and Myers have appealed therefrom and demanded a review of the evidence under section 7229, Rev. Codes 1905.

The plaintiff claims title to the land in controversy under two quitclaim deeds—one from Daniel H. Beck, dated October 21, 1903; and the other from Willis H. Ludlow, dated September 30, 1903. The said grantors were the joint owners of said tract prior thereto. It is undisputed that these grantors were the owners of this land at the time of giving these deeds, unless their titles had been divested by prior tax proceedings. It is claimed that these deeds to the plaintiff were void under the rule laid down in *Galbraith v. Payne*, 12 N. D. 164, 96 N. W. 258. The contention is that the grantors had taken no rents for more than one year prior to the giving of these deeds and that the land was in the adverse possession of the defendant. No one was occupying the land adversely to the grantors at the time the deeds were delivered. It follows that the facts of this case as to adverse possession at the time of giving the deeds are not so favorable to defendants as were the facts in *State Finance Co. v. Beck et al.*, 15 N. D. 374, 109 N. W. 357. In that case it was held that the deed was not void for champerty, as defined in section 8733, Rev. Codes 1905. We adhere to that decision, and it is decisive of this case on this point.

The further contention is advanced in this connection that the plaintiff cannot maintain the action, for the reason that one of the plaintiff's attorneys, and an officer of the plaintiff corporation, examined the county records and therefore had notice of the defendants' deeds before it purchased the land, and the deeds procured after such examination are in consequence in violation of said section 8733, Rev. Codes 1905. We fail to see any persuasive force in the contention. The invalidity of deeds of land while adversely held by another exists only between the adverse possessors and the grantor. If the title never passed to the defendants under the tax proceedings, the mere fact that the plaintiff examined the records and purchased the land thereafter does not make such section applicable, nor bar plaintiff from bringing an equitable action to determine its rights to the land. It was an unconditional purchase of land of which no one

had actual possession, and it had none of the elements of a champertous contract.

It is further claimed the grant in the Ludlow deed contained a disclaimer of any interest in the property, and that plaintiff is therefore now estopped from claiming any interest in the land as against the tax claimants. The deed contained the following clause: "And it is expressly understood and agreed that, in executing and delivering these presents to the said party of the second part, the said party of the first part makes no representation as to his title to the premises therein described." The granting clause of the deed was as follows: "Does hereby grant, bargain, sell, remise, release, quitclaim and convey." The special clause in the deed was undoubtedly inserted therein to negative any possible claim of liability in case the grantor had no title to the land. It cannot reasonably be construed as showing that the grantor did not then have title to or had abandoned the land.

It is contended on behalf of the plaintiff that the taxes on which the defendants base their title to the land are void for the reason that there was no legal assessment of the land during any of the years that the land was assessed. The land was owned by Daniel H. Beck and Willis H. Ludlow jointly, and it is described as the $S\frac{1}{2}$ of $SW\frac{1}{4}$ of section 14, township 139, range 65. The $N\frac{1}{2}$ of said $SW\frac{1}{4}$ was owned by Willis H. Ludlow in his own right. The assessment was made in the name of "D. H. Buck." The land was assessed in one parcel or tract, and was described in the assessment roll as the $SW\frac{1}{4}$ of section 14, township 139, range 65. The contention is that there was no assessment at all of the $S\frac{1}{2}$ of the $SW\frac{1}{4}$. This was the description of the land as assessed during each of the years for the taxes on which the defendants' titles or liens are based. The interest of Ludlow in the land is not described or mentioned in the tax proceedings or in the deed. If an assessment by such a description is void, then all the proceedings on which the defendants based their titles are void. The assessments were made under the revenue law of 1890 until 1897, and during the latter year and thereafter were made under the revenue law of 1897. So far as the question under consideration is concerned, the two laws are identical. They provide as follows: "He (the assessor) shall actually view when practicable, and determine the true and full value of each tract or lot of real property listed for taxation and shall enter the value thereof in one column," etc. Section 32, c.

132, p. 376, Laws 1890. "The terms 'tract' or 'lot' and 'piece' or 'parcel of real property' and 'piece' or 'parcel of land,' wherever used in this act, shall be held to mean any contiguous quantity of land in the possession, owned by, or recorded as the property of, the same claimant, person or company." Section 1, c. 132, p. 292, Laws 1897. Under these sections it seems plain that the smaller tracts or subdivisions composing a larger tract cannot be assessed as one tract where the land is owned by different persons under recorded titles or in joint ownership. Assessments in one tract of different ownerships or estates in different tracts seem to be inhibited by the sections read, where the different titles are of record. A tract of land belonging to one person partially and assessed to him alone is against the provisions of the sections quoted. There was but one valuation fixed upon this land, and that was upon the SW $\frac{1}{4}$ only. There is no presumption that the N $\frac{1}{2}$ of said quarter was of the same valuation as the S $\frac{1}{2}$. Ludlow, the owner of the undivided half of the S $\frac{1}{2}$ of the SW $\frac{1}{4}$, had no way of ascertaining what sum he should pay as his share of the tax, and the same is true as to what Beck should pay on the N $\frac{1}{2}$ of that quarter.

It seems clear that there was no such assessment of this quarter as is contemplated by the statute. Two things seem to be essential before tracts of land can be assessed in a body: (1) The tracts must be contiguous. *State Finance Co. v. Beck*, supra. (2) Separate ownerships or interests must be separately assessed in tracts corresponding with the ownership or interest. In this case there were two interests at least assessed as one tract; that is, the N $\frac{1}{2}$, owned by Beck, and the S $\frac{1}{2}$, jointly owned by Beck and Ludlow. We deem this a defect in the assessment of a jurisdictional character. It went to the groundwork of the tax. There was no tax, and no tender was necessary. *State Finance Co. v. Beck*, supra; *Roberts v. Bank*, 8 N. D. 504, 79 N. W. 1049; *Douglas v. City of Fargo*, 13 N. D. 467, 101 N. W. 919. The invalidity is not based on the fact that the owner's name was not given in the assessment roll, but upon the fact that there was no description of the tracts or parcels attempted to be assessed. *Hertzler et al. v. Freeman*, 12 N. D. 187, 96 N. W. 294.

The invalidity of the assessment is not seriously denied by the appellants. They attempt to show that the invalidity is immaterial, in view of the provisions of section 92, c. 132, p. 376, Laws of 1890, and section 96, c. 126, p. 292, Laws of 1897. These sec-

tions are identical, and, so far as material, read as follows: "When the transfer of any land or town lot or any part thereof becomes necessary by reason of a sale or conveyance, is of less value than the whole tract or lot, or part thereof, as charged on the tax list, said county auditor shall transfer the same whenever the seller and purchaser agree thereto in writing, signed by them, or personally appear before the auditor and agree upon the amount of valuation to be transferred therewith; but if the seller and purchaser do not agree as to the amount of valuation to be transferred, the auditor shall make such divisions of the valuation as may appear to him to be just." These sections have no application to the case under consideration. There was no transfer of the land in question after any of the assessments in question, except that to the plaintiff. There was no change of ownership of the $S\frac{1}{2}$ of section 12 between 1887 and 1903 by voluntary deed, and the title and joint interest of Beck and Ludlow in the 80 acres involved in this suit was shown by the records since 1887. In *Roberts v. Bank*, 8 N. D. 504, 79 N. W. 1049, it was said: "True, section 92 of said chapter 132 provides for certain cases where an entire valuation may be divided and portions thereof transferred to different parts of the tract originally assessed in solido. But, as we construe the section, it applies only to cases where, after the tax list has been delivered to the assessor and before the tax becomes a lien, a portion of the entire tract is transferred. The parties in interest may then appear before the auditor and agree upon the portion of the valuation that may be transferred to the portion of the tract owned by each, or, if they fail to agree, the auditor may make such transfer as may be just. But that section does not apply when the separate ownership of the separate parties appeared of record when the list was prepared.

The defect considered being fatal to all tax proceedings, it is unnecessary to consider the other defects relied upon by the plaintiff. It is also unnecessary to consider the curative provisions relating to defective taxes contained in chapter 166, p. 232, Laws of 1903. This statute does not apply to defects of a fundamental character, such as we hold the assessments in question to be.

The judgment is confirmed. All concur.

(112 N. W. 76.)

STATE FINANCE COMPANY v. W. B. S. TRIMBLE, WILLIAM H.
BECK AND VALERIA A. MEYERS.

Opinion filed June 25, 1907.

Champerly and Maintenance — Knowledge of Defects in Title.

1. The mere fact that a grantee of a deed of vacant land examined the records of the office of the register of deeds before purchasing the land, and thereby discovered defects in defendants' titles, does not render the deed void for maintenance.

Tax Certificate — Failure to Erase Inessential Parts.

2. The fact that portions of a blank certificate of sale of land for taxes, under chapter 67, p. 76, Laws 1897, which apply to a sale under different conditions, are not erased before delivery, does not render such certificate void on its face.

Original Judgment instead of Copy.

3. The fact that the sheriff sold land for delinquent taxes under the original judgment, and not under a certified copy thereof is not a jurisdictional defect that renders the sale void.

Void Deed as Evidence.

4. A void tax deed is not evidence of a tax sale or of the existence of a tax.

Payment of Tax as Condition of Relief.

5. A court of equity will not require the payment of taxes as a condition of relief from a deed, where there has been no assessment for want of a sufficient description of the land.

Same.

6. Where there has been a valid assessment and levy, and there exist no other jurisdictional defects, equity will require payment of the tax before relief will be decreed.

Same — Notice of Expiration of Redemption Period.

7. Notice of the expiration of time for a redemption under a sale under the "Wood Law" is insufficient, when it erroneously describes the land and does not clearly apprise the owner that his land has been sold and that the time for redemption is about to expire.

Same — Sufficiency of Description of Land Taxed.

8. Various descriptions of land in assessment rolls and notices considered, and their sufficiency passed upon.

Appeal from District Court, Stutsman county; *Glaspell, J.*

Action by the State Finance Company against W. B. S. Trimble and others. From a judgment for plaintiff, defendants appeal.

Modified and affirmed.

Marion Conklin and *F. G. Kneeland*, for appellants. *John Knauf* and *Wicks, Paige & Lamb*, for respondents.

MORGAN, C. J. Action to determine conflicting claims to real estate. Plaintiff alleges that it is the owner in fee of 160 acres of land situated in Stutsman county, described as follows: The N $\frac{1}{2}$ of the N E $\frac{1}{4}$ and the S E $\frac{1}{4}$ of the N E $\frac{1}{4}$, and the N E $\frac{1}{4}$ of the S E $\frac{1}{4}$ of section 12, township 140, range 63—and that the defendants claim certain estates, interests, liens, and incumbrances upon the same adversely to the plaintiff. The relief demanded is that the title to said land be quieted in the plaintiff. The plaintiff claims the ownership of the land by virtue of a deed executed and delivered to it by James E. Dore, dated September 17, 1903. The defendants answered, and alleged their absolute ownership of the land by virtue of certain tax sale certificates and deeds, as follows: Sheriff's certificate of sale to Wm. H. Beck, under the "Wood Law," dated November 21, 1898. Tax deed to W. H. Beck for 1895 tax, dated January 11, 1901. Tax deed to W. H. Beck for 1896 tax, dated January 11, 1901. The defendant Valeria R. Myers claims title under a deed executed and delivered to David Myers on December 24, 1897. The defendant Trimble claims title by virtue of a tax deed under the 1897 tax, dated June 25, 1903, under the certificate of sale to Beck, which was assigned to him. After a trial, the district court adjudged that the defendants' alleged titles were null and void, and gave judgment for the plaintiff as prayed for. The defendants have appealed from the judgment and request a review of all the evidence in this court, under section 7229, Rev. Codes 1905.

* The defendants claim that the plaintiff's title under the Dore deed is void for maintenance. The evidence is the same in this case on that point as in the case of *State Finance Co. v. Bowdle*, 112 N. W. 76, recently decided by this court. Adhering to that decision as controlling of this case, the objection is held not tenable for the reasons given in that case.

The defendant Beck claims title under a tax deed for the 1895 tax, and also one under the 1896 tax. The objections to the 1895 tax title are: That two tracts were described in one notice of sale, and that two separate tracts were advertised to be offered for sale as one tract, for one sum, as a delinquent tax. The description in the notice of sale was the "N. $\frac{1}{2}$ Se. $\frac{1}{4}$ Ne. $\frac{1}{4}$ and Ne. $\frac{1}{4}$ Se. $\frac{1}{4}$, Sec. 12, Twp. 140. R. 63—160 acres." This description can mean but one thing, and that is a tract of 20 acres in the N $\frac{1}{2}$ of the S E $\frac{1}{4}$ of the N E $\frac{1}{4}$, and 40 acres in the S E $\frac{1}{4}$. These tracts are separate tracts, and the notice did not properly describe them as such, and they could not be sold as one tract, as was done in this case. This irregularity did not vitiate the tax. This fact rendered the sale incurably void, as there was no such notice of sale as required by the statute. There is no evidence, however, that the assessment was void. It is also claimed that there was no legal levy of a tax this year, for the alleged reason that it was made by the board of equalization, and not by the board of county commissioners. The minutes do not show that the equalization board made the levy, although the record of the levy is shown in a record which seems to have been used by both boards for record purposes. We do not find that the record shows that the levy was not made by the county commissioners. There is nothing, therefore, to rebut the presumption that the officers properly performed their duty. Before the proceedings of county commissioners can be successfully attacked as illegal, the proof must first clearly show the illegal act. Without conceding that the objection would be tenable, if proven, we conclude that making a record of the levy in a wrong book, in which are also recorded proceedings of the board of equalization, is not even *prima facie* evidence that the county commissioners did not make the levy. There was, therefore, a valid tax for the year 1895.

Tax deeds were issued to the defendant Beck under the 1896 assessment. The tax on which this deed was issued was inherently void. There was no proper description of the land on the assessment roll. The description of the land as assessed was: "N. $\frac{1}{2}$ and S. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$, Sec. 12, Twp. 140, R. 63—160 acres." This is not a description of the tract of land attempted to be assessed. When read as punctuated, it is meaningless. In no way can this description be read to be equivalent to the proper description, which is as follows: N $\frac{1}{2}$ of N E $\frac{1}{4}$

and the S E $\frac{1}{4}$ of the N E $\frac{1}{4}$ and N E $\frac{1}{4}$ of S E $\frac{1}{4}$. The description was jurisdictionally erroneous. The assessment was void, as well as all subsequent proceedings. There was no tax on which a recovery for the amounts paid can be had. No tender of the tax was necessary in order to maintain the action. *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117.

The defendant Beck also claims title under a certificate of sale under chapter 67, p. 76, Laws 1897, commonly known as the "Wood Law." This certificate was dated November 21, 1898. The plaintiff's objections to the title conveyed by this certificate of sale are: (1) That the sheriff sold the land under the original judgment book; and not under a certified copy of the judgment. (2) That the certificate of sale contains unerased statements not applicable to the sale in question, and which should have been erased before the delivery of the certificate. Each of these objections was considered and passed upon in *Nind v. Myers* (N. D.) 109 N. W. 335, and in *State Finance Co. v. Beck*, 109 N. W. 357, and held not tenable. That decision is controlling of this case so far as these points are concerned.

The further objection is made to the certificate in this case that the land was not properly described in the published notice of the delinquent tax list. The description was as follows: "The N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$, Sec. 12, Twp. 140, R. 63." The list also contained the name of the person to whom assessed and the amount of taxes, and recited the number of acres as 160. More than three years had elapsed since the certificate of sale was issued before this action was commenced. In view of this fact, we deem it immaterial that this description was an irregular one of the land involved in the tax proceedings. It may be conceded that the judgment was void for want of a correct description in the published list, and that fact not nullify the defendant's title under the sale. This precise question was involved in *Nind v. Myers*, supra, and decided adversely to plaintiff's contention. The question was exhaustively considered in that case, and we agreed that that decision should not be departed from.

It is further contended that the defendant's tax certificate is of no effect for the alleged reason that there was no proper notice of the expiration of the time for a redemption, and no proper service of the notice. Many of the objections to the notice and

to the service thereof are the same as those covered by the decision in *Nind v. Myers*, supra, and need not be considered. The exceptions are that the notice did not apprise the owner of the land that his land had been sold for taxes. In other words, there was no proper description of the land. In fact, the land was erroneously described. The description in the notice was as follows: "The N. $\frac{1}{2}$ and the S. E. $\frac{1}{4}$ of Sec. 12, Twp. 140, R. 63." The land was the N $\frac{1}{2}$ of the N E $\frac{1}{4}$ and the S E $\frac{1}{4}$ of the N E $\frac{1}{4}$, and the N E $\frac{1}{4}$ of the S E $\frac{1}{4}$ of section 12, township 140, range 63. This is a description of a different tract than that which was assessed. The description in the notice did not inform the owner that his land had been sold for taxes and that the period for a redemption was about to expire. The notice stated nothing from which it could be inferred even that this land was that which had been owned by and assessed to Maschger, except the fact, stated in the notice directed to him, "that the following piece or parcel of land, of which you appear to be the owner," had been sold under a tax judgment on November 21, 1898. The notice was clearly insufficient to cut off the owner's right of redemption. Section 14, chapter 67, p. 76, Laws 1897, the section which provides for a notice of expiration of time for redemption, is not definite as to what the notice shall contain; but it is clearly necessary that it shall describe the land and the time when the right to redeem expires. Failure to describe the land correctly vitiated the notice, and defendant did not acquire the title thereto under the sale.

The deed under which Trimble claims title was issued in 1903 for the taxes of 1897. This deed is attacked on several grounds, among which is the one that there was no legal notice of sale of the land in 1900. The objection is founded on the want of a correct description. The description in the notice was as follows: "The W. $\frac{1}{2}$ and S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, Sec. 12 Twp. 140, R. 63 containing 160 acres." This is not a description that can be read to mean the land involved in the assessment; that is, the N $\frac{1}{2}$ of N E $\frac{1}{4}$ and S E $\frac{1}{4}$ of N E $\frac{1}{4}$ and N E $\frac{1}{4}$ of S E $\frac{1}{4}$. This error in the description rendered the sale void. There was no legal sale; but the invalidity of the tax has not been shown.

More than a year after the appeal to this court was taken plaintiff made a conditional offer to pay the taxes on which the de-

fendants' tax titles are based. This offer was not accepted, and by its terms was to be considered withdrawn, unless accepted. We do not deem this to be an offer to pay the taxes that should be held effectual to relieve plaintiff from paying any costs. The offer was made too late, and was conditional.

The district court is directed to modify its judgment to the effect that the title to the land involved in the suit be quieted in the plaintiff upon payment to the defendant Beck of all sums paid and the taxes involved in the "Wood Law" judgment of 1898 under the 1895 assessment. No costs will be awarded to either party in either court. All concur.

(112 N. W. 984.)

FRED E. HARRIS V. ROLETTE COUNTY.

Opinion filed June 24, 1907.

Criminal Law — Preliminary Examination — Appointment of Counsel — Power of Justice of the Peace.

1. A justice of the peace, acting as a committing magistrate, is not authorized under the provisions of the Revised Codes to appoint counsel to defend the person accused of crime and brought before him for preliminary examination, and has no inherent power to make such appointment, or to make a valid order that the county pay such counsel.

Same.

2. A preliminary examination of a person accused of crime is not a trial within the meaning of that term in section 10216, Rev. Codes 1905.

Same.

3. A committing magistrate has in general only such powers as are conferred upon him by statute.

Appeal from District Court, Rolette county; *John F. Cowan, J.*

Action by Fred E. Harris against Rolette county. From a judgment for defendant plaintiff appeals.

Affirmed.

Fred E. Harris and *H. E. Plymat*, for appellant.

Preliminary examination is a "trial." Ex parte Bedford, 106 Mo. 625; State v. McOblenis, 24 Mo. 402; Low v. People, 12

Wend, 344; *People v. Napthaly*, 39 Pac. 29; 16 Enc. Pl. & Pr. 846; *People v. Elliott*, 22 Pac. 207.

The county is liable on implied contract. *Webb v. Baird*, 6 Ind. 13; *Blythe v. State*, 4 Ind. 325; *Dane County v. Smith*, 13 Wis. 585; *Cheek v. Schwartz*, 70 Ind. 339; *Buchman v. State*, 69 Ind. 1.

Wm. Bateson, for respondent.

Preliminary examination is not a criminal action. *State v. Rozum*, 8 N. D. 548, 80 N. W. 477.

Appellant cannot recover on an implied contract. *Wayne County v. Waller*, 90 Pa. 99, 35 Am. Rep. 636; *Rowe v. Yuba County* 17 Cal. 61; *Vise v. Hamilton County*, 19 Ill. 78; *In re Eaton*, 7 N. D. 269, 74 N. W. 870.

MORGAN, C. J. This appeal presents the question of the right of an attorney to demand compensation from the county when he has been assigned by a justice's court to appear for an indigent defendant on a preliminary examination upon a charge of unlawfully selling mortgaged property. The plaintiff was assigned to defend, and appeared for the defendant, and the justice of the peace fixed his compensation at the sum of \$25. The county commissioners refused to pay or allow said sum as a claim against the county. Thereupon plaintiff brought an action against the county for said sum in justice's court, and recovered judgment for said sum with costs. The district court reversed the judgment of the justice of the peace on appeal thereto, and dismissed plaintiff's action.

The sole question before us is whether the county is liable for a reasonable attorney's fee under such facts. Section 13 of the Constitution gives to one accused of crime the right "to appear and defend in person and with counsel." Section 9758, Rev. Codes 1905, relating to preliminary examinations, provides that "the magistrate must immediately inform him of the charge against him and of his right to the aid of counsel in every stage of the proceedings." Section 9759 is as follows: "He must allow the defendant a reasonable time to send for counsel, and adjourn the examination for that purpose; and must, upon the request of the defendant, require a peace officer to take a message to such counsel in the county or city as the defendant may name. The

officer must, without delay, perform that duty, and shall receive fees therefor as upon service of a subpoena." Section 9760 is as follows: "The magistrate before whom the accused is brought, must, unless a change of the place of trial is had under the provisions of the next section, immediately after the appearance of counsel, or, if none appears and the accused requires the aid of counsel, after waiting a reasonable time therefor, proceed to examine the case." Section 8475, Rev. Codes 1905, is as follows: "When the defendant is brought before the justice he must be allowed a reasonable time and opportunity to procure counsel." Section 10216 is as follows: "In all criminal actions when it is satisfactorily shown to the court that the defendant has no means and is unable to employ counsel, the court shall appoint and assign counsel for his defense and allow and direct to be paid by the county in which such trial is had, a reasonable and just compensation to the attorney so assigned for such services as he may render; provided, however, that such attorney shall not be paid a sum to exceed twenty-five dollars in any one case."

It is claimed by the appellant that the section last quoted confers upon a justice's court the power to assign counsel for the defense of indigent persons on a preliminary examination. The argument advanced is that a preliminary examination is a trial within the meaning of that section. We cannot agree to this conclusion. See Enc. Pl. & Pr. p. 821, and cases cited. Upon a trial, whether civil or criminal, certain issues are determined finally. In a trial of a criminal action, the guilt of the accused is finally determined subject to appeal or other proceedings. On a preliminary examination there is no final determination of any issue on the question of guilt. The accused is held to answer on showing of probable cause of guilt, or discharged. If held to answer, the trial may follow in a court of record, but the examination is no part thereof. The mere reading of section 10216, *supra*, makes it too clear for discussion that it can have no application to preliminary examinations. It plainly applies to trials only. It may be admitted that a preliminary examination is a proceeding in a criminal action, and still plaintiff's contention that this section applies to preliminary examinations would not follow. If the county is liable for attorney's fees on preliminary examinations, the liability must rest upon some other provision of law. The constitutional provision referred to has no application to the ques-

tion involved. That provision guarantees to all accused persons the right to have counsel appear for them. As to the compensation of such counsel, that provision determines nothing. On reading the foregoing provisions of the statute, it is clear that they confer on committing magistrates no power to appoint counsel for indigent persons. Committing magistrates are of limited powers, and must look to statutory provisions to authorize their acts. They have no inherent power to bind the county for the compensation of attorneys appointed by them to defend indigent persons. Strictly speaking, they have no power to appoint such attorneys. All that these magistrates have power to do, and the only duty enjoined on them by the Constitution or statutes, is to grant defendants in criminal cases the right and opportunity to procure and to be heard by counsel. The power of appointment and to fix the compensation is not granted to justices of the peace or magistrates.

On comparison of sections 8475, 9759, and 9760, with section 10216, it is seen that the legislature has said what the rights of the accused are as to having counsel to represent him in every criminal proceeding before courts. The fact that no power is given justices of the peace or committing magistrates to appoint counsel and provide for their compensation, and, having made such provisions by section 10216, *supra*, it seems evident that the legislature intended to withhold such power from these inferior courts. Persons accused of crime, who are without means, have no constitutional right to have counsel assigned to them and paid by the county. They have the right to be represented by counsel, but that means no more than that they shall provide for their compensation and employment themselves. The statutes do not in terms or by implication empower these inferior courts to bind the county to pay for attorney's services under such circumstances. A reading of all the statutory provisions relating to this subject clearly shows that it was not intended to confer such power upon justices of the peace or committing magistrates. It is a matter of doubt whether courts of record have the power to bind the county for the compensation of attorneys appointed by them to defend indigent persons accused of crime in the absence of statutory authority. There is a wide diversity of judicial opinions on this question among courts of high standing. *People ex rel. Ransom v. Board of Supervisors of Niagara County*, 78 N. Y. 622;

People ex rel. Hadley v. Supervisors of Albany, 28 How. Pr. (N. Y.) 22; Whicher v. Cedar County, 1 G. Greene (Iowa) 217; Vise v. County of Hamilton, 19 Ill. 78; Carpenter v. County of Dane, 9 Wis. 274. No cases have been cited or found bearing upon the right of inferior courts to provide for the payment of attorneys appointed by them to appear for accused persons without means. Our conclusion is that the Code provisions negative their power to appoint attorneys in such cases, and that the power does not exist without statutory creation. It may seem harsh to deprive indigent persons of the right to have counsel on all occasions when charged with offenses, but we have nothing to do with the policy of the law. In practice we think that injurious consequences will seldom follow from the fact that the legislature has not provided for the appointment and payment of counsel for indigent persons on their preliminary examinations.

The judgment is affirmed. All concur.

(112 N. W. 971.)

THOMAS J. SMITH v. EDWIN T. SPAFFORD AND ARTHUR TURNER,
AS SHERIFF OF GRAND FORKS COUNTY, NORTH DAKOTA.

Opinion filed June 25, 1907.

Homestead — Residence Essential.

1. Residence upon land is generally necessary before a homestead therein can be claimed as exempt.

Same — Removal.

2. A removal from the homestead, with the intention to abandon the same as a homestead, defeats the homestead exemption after creditors' rights have intervened.

Same — Declarations of Homesteader.

3. Declarations of the homesteader as to his intentions are competent evidence to sustain the homestead exemption, but such declarations are not conclusive.

Same — Evidence.

4. Evidence considered, and *held* to show an abandonment of the homestead.

Appeal from District Court, Grand Forks county; *Fisk, J.*

Action by Thomas J. Smith against Edwin T. Spafford and another. From a judgment in favor of defendants, plaintiff appeals.

Affirmed.

Frank B. Feetham, for appellant.

Presumption of abandonment may be overcome by retaining a part of the premises, keeping a portion of household goods and entertaining the intention to re-occupy. *Repenn v. Davis*, 34 N. W. 326; *Painter v. Steffon*, 54 N. W. 229; *McDermott v. Kerman*, 39 N. W. 537; *Wiggins v. Chance*, 54 Ill. 175; *Herforth v. Zimmerman*, 7 Ky. L. Rep. 696; *Reilly v. Reilly*, 26 N. E. 604; *Torulmson v. Swimey*, 76 A. D. 432; *Taylor v. Hargues*, 60 Am. Dec. 609; *Harmbison v. Tennison*, 38 S. W. 232; *Eckman v. Reid*, 58 N. W. 202. Intent to abandon and actual abandonment must exist. *Reilly v. Reilly*, supra; *Edmonson v. White*, 8 N. D. 72, 76 N. W. 986; *Brokken v. Baumann*, 10 N. D. 453, 88 N. W. 84; *Clark v. Evans*, 60 N. W. 862; *Kuhnert v. Conrad*, 6 N. D. 215, 69 N. W. 185; *Rosholt v. Mehus*, 3 N. D. 513, 57 N. W. 783, 23 L. R. A. 239.

J. H. Bosard, for respondent.

Intention to re-occupy must be continuing. *Maguire v. Hanson*, 74 N. W. 776; *Corey v. Schuster*, 62 N. W. 470; *Gunn v. Wynne*, 43 S. W. 29; *Schwartzman v. Cabell*, 49 S. W. 113; *Bell v. Grathouse*, 20 Tex. Civ. App. 478; *Wolf v. Hawkins*, 60 Ark. 262; *Cotton v. Hamil*, 12 N. W. 607; *Curran v. Culf*, 13 Ky. L. Rep. 84; *Donaldson v. Lamprey*, 29 Minn. 18; *Jarvais v. Moe*, 38 Wis. 440; *Conway v. Nichols*, 76 N. W. 681; *Gregory v. Oates*, 92 Ky. 532; *Hall v. McGlothlin*, 6 Ky. L. Rep. 661.

Filing declaration not conclusive. *Kuhnert v. Conrad*, 6 N. D. 215, 69 N. W. 185.

MORGAN, C. J. This is a suit in equity to restrain the sheriff and an attachment creditor from taking further proceedings under an attachment levy. The plaintiff is a purchaser of the attachment debtor of the 160 acres involved in the suit. The issue involved is whether Anderson, the attachment debtor, had abandoned the land as his homestead when the attachment writ was levied. It is undisputed that said Anderson occupied the land with his wife

as their homestead up to December 11, 1902. On that day, they removed from the land to Thompson, 2½ miles distant therefrom; the husband going into the livery business. He purchased a livery stable and business, and rented a house, in which he and his wife lived. They took with them most of the household furniture from the house on the homestead. This house was occupied during their absence by a hired man, who farmed the land for the husband. Some furniture was left in the house, for the reason that there was no room for it in the house which Anderson had rented in Thompson, and it was therefore left on the farm for the use of the hired man, for whom his sister kept house. They left a bedstead, three chairs, and a table, and a stove belonging to one of the neighbors. When Anderson left this farm and moved to Thompson to engage in the livery business, no declarations were made by him or his wife as to their intentions as to abandoning the homestead or of their intentions of returning. In his testimony on the trial, he says that he gave no thought at that time about abandoning the land, and also says that he expected to return to the land. Before leaving the farm on December 11th, he had rented a house to live in in Thompson for an indefinite time from month to month. He lived in this house about 10 months, and then moved into another, which he rented until April 1, 1904. Before April 1st, and about January 25, 1904, he moved back upon the farm on which he had not actually resided since December 11, 1902. During the time that he was in Thompson, he frequently drove out to the farm, which was being cultivated by his hired man. About December 15, 1903, he consulted an attorney concerning his homestead rights and his right to file a declaration of homestead. He was informed by the attorney that he could not file such a declaration unless he was an actual resident upon the land. About a month thereafter, he went upon the land with his wife and resided there until March 1st, when he moved to a rented farm near Willow Lake, in Nelson county, North Dakota. He testifies that he went back to live upon the homestead in January, 1904, for the purpose of enabling him to file a declaration of homestead. A few days thereafter, and about February 1st, he executed and filed his homestead declaration in the office of the register of deeds of Grand Forks county. On February 4, 1904, he sold the land to the plaintiff for the sum of \$5,500. The land was heavily incumbered by mortgages and a

judgment, and Anderson received only about \$600 out of the purchase money; the balance thereof having been used to pay the incumbrances. During Anderson's residence in Thompson, he frequently made statements that he was going to Willow Lake to engage in the stock business. He sold out the livery business in December, 1903, and then stated that he was going to Willow Lake to engage in the stock business. He had, on several different times during his absence from the homestead, entered into negotiations for the sale thereof. During all of this time he had made no declaration nor shown by any act on his part that he intended to go back to the farm to live, except the fact of the consultation with the attorney about his homestead rights. He and his wife now testify that they never intended to abandon the homestead, and that they always considered it their home. On December 12th, the defendant Spafford attached the land in question upon a personal debt, and on January 25, 1904, judgment was entered in that action. The consultation with the attorney was just about the time that the attachment proceedings were commenced. The attachment writ was levied before the declaration of homestead was filed and before he moved back upon the land. From these facts, we are to determine whether Anderson had abandoned the land as his residence and home. The trial court found that he had abandoned the land, and that the lien of the attachment became effectual. The plaintiff, Anderson's grantee, has appealed from the judgment and asks a review of all the testimony under section 7229, Rev. Codes 1905.

It is evident that the rights of the parties must be determined as they existed at the date of the attachment. What occurred subsequent to that day is competent as explaining Anderson's intentions prior to the levy of the attachment. If the evidence shows that he had abandoned the land when the attachment was levied, nothing that he did thereafter would defeat the lien of the attachment. The crucial question is: What were his intentions when he moved to Thompson to engage in the livery business? Nothing was said by him to indicate whether the removal was to be temporary or permanent. A person is not entitled to claim his land exempt as a homestead unless he is residing thereon. Section 3605, Rev. Codes 1899, in force when he removed from the farm, and under which these proceedings were taken, makes residence a prerequisite to the claiming of homestead rights.

"Residence," under that section, is construed not to mean actual and continuous residence on the homestead. Temporary absence and removal therefrom do not defeat the right to the homestead. *Edmonson v. White*, 8 N. D. 74, 76 N. W. 986. The duration or length of time of the absence is not of controlling weight. A removal with intention never to return defeats the homestead, if the rights of creditors attach, although the removal continues but a short time. An absence for years, with continuous intention of returning to it, gives creditors no right to the land. Upon a careful review of all the evidence, we are forced to the conclusion that Anderson had abandoned this land when the defendant attached it. Up to the time in December, 1903, when he consulted with the attorney, we find no fact in evidence evincing an intention to return to the land to make it the home of himself and wife. It is true Anderson and his wife both testify now that it was always their intention to return thereto and make it their home. While this is competent evidence to be considered on this question, it is not at all of conclusive force. Facts and circumstances have a more convincing effect as evidence than such declarations made after matters have arisen that make such declarations essential to save the homestead. A removal, unexplained, at the time, is presumptively a permanent one. In *Jarvais v. Moe*, 38 Wis. 440, it was said: "When he made the removal, the presumption was that he did so *animo manendi*. The presumption might be rebutted by circumstances and conditions surrounding the removal, or declarations accompanying it, manifesting a temporary purpose and an intention to return, but not satisfactorily by *ex post facto* professions, after intervening circumstances have made return advantageous. The intention which is sufficient to rebut the presumption must be positive and certain—not conditional or indefinite." See, also, *Thompson on Homesteads and Exemptions*, section 270, and *Ungers v. Chapman* (Mich.) 109 N. W. 1124.

Upon reviewing all of the evidence, we find no fact proven that indicates that Anderson did not remove from the place with the intention of permanently abandoning it as a residence or home, up to the incident of his consulting with an attorney in December, 1903. This was so close in time to the levying of the attachment that it is of little benefit to Anderson as showing what his intention was when he left the homestead one year before. The leaving

of some furniture at the farm shows nothing favorable to his return thereto, as the furniture was left there for use by the hired man, and for the further reason that he had no room for it in his Thompson residence. His present declaration that he never intended to abandon his homestead is not corroborated by any independent fact that happened during the year following his removal therefrom. Circumstances are numerous indicating that he had abandoned it. The land was heavily incumbered with liens; some of them drawing 12 per cent interest. His equity in the premises was comparatively small. He moved therefrom and engaged in business of a permanent character. He repeatedly tried to sell this land, and stated about the time that the attachment was levied that he intended moving to an adjoining county to engage in a permanent business, and he did ultimately move there. We think it is shown by the evidence that he stated at different times that he did not intend to move back upon the farm and gave people to understand that he was going to make his permanent home elsewhere. These admitted or proven facts are ample to overcome the unsatisfactory probative force of his present declarations as to what his intentions were when he removed from the place. The adjudications on this question are of no particular assistance. Each case must be governed by its own particular facts. If Anderson removed from the premises intending to permanently leave them, he lost his homestead exemption. We think the evidence sustains the conclusion of the trial court that he intended to abandon them permanently when he removed therefrom.

Appellant insists that *Repenn v. Davis*, 34 N. W. 326, 72 Iowa 548, is an authority in point, in which the court sustained the claim of homestead on facts of less weight than those in the case at bar. We do not so understand that case. The time of absence was longer than in this case, but in that case the intention to return at all times was found as a fact, and the homesteader retained a room on the place, in which part of the household furniture was left, and the entire possession of the home and lot was never surrendered to any one during his absence.

The judgment is affirmed. All concur.

FISK, J., disqualified. Judge TEMPLETON, of the First district, sitting by request.

(112 N. W. 965.)

STATE FINANCE COMPANY, A CORPORATION, v. H. MULBERGER, ET AL., DEFENDANTS, AND WM. H. BECK AND VALERIA R. MYERS, APPELLANTS.

Opinion filed June 27, 1907.

Taxation — Void Tax Certificate as Evidence.

1. A certificate of sale of land for the taxes of 1895, which is void for irregularity in the description of land is not any evidence of assessment and levy of a tax.

Same — Description of Land.

2. A description of the land assessed is essential to a valid tax, and unless there is such a description there is no assessment, and consequently no tax.

Same — Effect of Wrong Description of Land in Notices.

3. Notices of tax sales and notices of the time when redemption will expire must describe the land involved in the tax, and such notices are not effectual without such description.

Same — Tax Deed.

4. A tax deed issued in 1898 in the name of a county, and not in the name of the state, is void.

Same — Notice of Expiration of Period of Redemption.

5. Service of notice of the time when the period for redemption from a tax sale will expire on the holder of a void tax deed as owner is not effectual for any purpose.

Same — Description of Land — Sufficiency.

6. Various descriptions of land in assessments, notices of sale, and notices of expiration of redemption period considered, and their sufficiency passed upon.

Appeal from District Court, Stutsman county; *Glaspell, J.*

Action by the State Finance Company against H. Mulberger, William H. Beck, and another. From a judgment for plaintiff, William H. Beck and another appeal.

Modified and affirmed.

Marion Conklin and *F. G. Kneeland*, for appellants. *John Knauf* and *Wicks, Paige & Lamb*, for respondent.

MORGAN, C. J. This is an action to quiet title, and involves the E ½ of the N E ¼ and the S W ¼ of the N E ¼ of section 7, township 139, range 63. The complaint is in the statutory

form, and alleges that plaintiff is the owner in fee of the land. The defendants Beck and Myers answered separately, and denied the plaintiff's ownership of the land, and the defendant Beck claimed to be the absolute owner thereof by virtue of tax deeds and tax certificates subject to the defendant Myers' interest in the same. The plaintiff claims title to the land under a deed from the former owner, L. F. Cale, dated in 1903. The defendant Beck contends that Cale's title had been divested by virtue of tax proceedings which had vested the absolute title to the land in him. The tax titles under which Beck claims are the following: (1) A tax deed dated December 17, 1898, under the sale of the land in 1895 for the tax of 1894. (2) A tax deed dated January 11, 1901, under a sale of the land in 1897 for the tax of 1895. (3) A tax deed dated January 11, 1901, under a sale in 1897 for the tax of 1896. (4) A tax certificate under a sale of the land on November 21, 1898, on a judgment rendered under chapter 67, p. 76, Laws 1897, known as the "Wood Law."

There are many objections brought forward to the defendant's title, identically the same as in the cases just decided between these same parties. *State Finance Co. v. Bowdle*, 112 N. W.—; *State Finance Co. v. Trimble*, 112 N. W. 984. These objections, so far as passed upon in those cases, will not here be noticed. The defendants have also raised the same objections to the plaintiff's title as they did in those cases. Those objections will not be further noticed.

It is conceded that the tax deed of 1898 under the sale of 1895 for the taxes of 1894 is void, for the reason that said deed runs in the name of Stutsman county, and not in the name of the state of North Dakota. This question was passed upon in a recent decision of this court in *State Finance Co. v. Beck*, reported in 109 N. W. 357, and in *Beggs v. Paine*, 109 N. W. 322.

Appellant Beck introduced in evidence the tax certificate on which this deed was based, and claims that he is entitled to judgment against the plaintiff for the taxes paid by him. This follows, if the sale was a valid one and based on a valid assessment and levy. The plaintiff attacks the sale as not based on a legal notice of sale, alleging that the land was erroneously described. The land was described in the notice as the "E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$." This was a description of 20 acres only, while the land sold was 120 acres, as evidenced by the certificate. The notice

was fatally defective, and not in compliance with the provisions of the revenue law of 1890. The trial court did not err in refusing to render judgment for the taxes paid at the sale of 1895. There was no proof of a valid tax.

The deed under the 1895 tax, which was issued in 1901, is attacked on various grounds, among them that there was no legal notice of the time when the redemption period expired. This deed is void for that reason. The notice of expiration of the redemption period was not directed to nor served upon the owner of the land. It was served upon H. Mulberger, who claimed to own the land. His title, however, was based on a void tax deed. He was not the actual owner. He was attempting to hold said land under a void tax deed. Service of redemption notice upon the holder of such a deed is not a compliance with the statute. *Nind v. Myers*, 109 N. W. 335.

The plaintiff also attacks the validity of the defendant Beck's title under the "Wood Law" sale. It is claimed that the title never vested in the defendant, for the reason that no sufficient notice was given of the expiration of the redemption period. The objections are that the description was insufficient and erroneous and that the notice was not served on the owner. One Cale was the owner, unless his title had been divested by prior tax proceedings. Appellant claims that notice was served on Mulberger and one on Beck as owners of the land under prior tax deeds. They were claiming under void tax deeds, and service upon them was not a compliance with the statute. *State Finance Co. v. Beck*, *supra*. The deeds under which they claimed were void for want of a proper description in the assessment roll. Each of these deeds was based on an assessment of the land described as follows: "S. W. $\frac{1}{4}$ E² and S. W. $\frac{1}{4}$ N. E.⁴ Sec. 7, Twp. 139, R. 63." Under previous decisions of this court, since the cases of *Power v. Larabee*, 2 N. D. 141, 49 N. W. 724, and *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511, such descriptions in the assessment roll have been held to be no descriptions at all, and that they are not a proper foundation for subsequent tax proceedings. See, also, *Nind v. Myers*, *supra*.

The defendant Beck concedes that the deed given for the 1896 tax was void because of the insufficiency of the description of the land in the notice of sale. He contends, however, that the

taxes paid by him should be held valid, and judgment entered that plaintiff shall pay the same. If the sale was void, as conceded, then the certificate could have no evidentiary force to establish a tax.

The assessment for the year 1897 is attacked on the ground that there was no description of the land in the assessment roll. A tax deed was issued in 1901 under this assessment. The land was described in the assessment roll and in the deed as the "E. $\frac{1}{2}$ S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$," section 7, township 139, range 63, containing 120 acres. This description was only at best a description of 20 acres, and it cannot possibly be said to describe 120 acres without adding to the description, which is not permissible. The mere fact that it is said to contain 120 acres does not help out the description. If by any means the description in the assessment roll could be read to mean 120 acres, then it might be that the numbers, read in connection with the description, might make the description definite and certain. This defective description vitiated the assessment and all subsequent proceedings. There was no valid tax, and no judgment can be rendered against the plaintiff for the same.

It follows that plaintiff is entitled to a judgment declaring all the adverse claims of Beck and Myers null and void upon payment of the tax on which the land was sold under the "Wood Law" and the taxes paid under the 1895 assessment. The district court is directed to modify its judgment in this particular. No costs will be allowed to either party in either court.

Modified and affirmed. All concur.

(112 N. W. 986.)

P. J. CARR AND ERICK ERICKSON, PLAINTIFFS AND RESPONDENTS,
v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY
COMPANY, A CORPORATION, DEFENDANT AND APPELLANT.

Opinion filed July 8, 1907.

Negligence — Contributory Negligence — Question for Jury.

1. Contributory negligence, as well as negligence of the defendant, are questions for the jury in a case at law, unless the conceded facts from which the inference must be drawn admit of only one conclusion.

Same.

2. If the facts relating to contributory negligence or to negligence of the defendant are such that different impartial minds might fairly draw different conclusions from them, they should be submitted to the jury, and are only for the court when such that fair-minded men might draw only one conclusion from them.

Injuries to Animals by Railway Trains — Contributory Negligence.

3. In an action for negligence of a railroad company in killing and injuring cattle on defendant's right of way by train, plaintiffs rested after proving the killing, injury, and value; but on cross-examination of plaintiffs' witnesses, by whom such proof had been made, it had been shown that plaintiffs' buildings were one mile from the railway track; that the cattle in question were confined at the buildings during the night, but in the day time were driven south of the buildings and turned onto grass land according to custom; that they had never before the day in question been known to stray upon the defendant's right of way, but on the day of the accident they went upon the defendant's right of way, without the knowledge of the plaintiffs, and some were killed and others injured by one of defendant's trains. *Held*, that the question of plaintiffs' negligence in turning their cattle out under the circumstances was for the jury.

Same — Negligence of Defendant — Directed Verdict.

4. In such a case, where there is a conflict in the evidence as to the time of day when the accident occurred, and as to whether the day was foggy or clear, and as to whether the train regarding which the defendant's witnesses testified was the one which did the damage, and as to other facts, it being conceded by the defendant's witnesses that they did not stop the train which they were running, and which killed cattle on that day and took no precaution to avoid injury after they discovered the cattle, *held*, that the question of negligence on the part of the defendant was properly submitted to the jury, and the defendant's motion for a directed verdict was properly overruled.

Same — Instruction.

5. Certain instructions to the jury examined and *held* proper.

Trial — Instruction — Oral Request.

6. While giving instructions to the jury, counsel interrupted the court with an inquiry regarding instructions, and after the court was through orally requested an instruction pursuant to such inquiry. *Held*, without reference to such request being in improper form or not stating the law correctly, that, by reason of its not having been submitted to the court in writing, it was not error to refuse it.

Contributory Negligence — Pleading.

7. Contributory negligence is a matter of defense, and should be pleaded.

Trial — Instructions — Written Charge.

8. Section 7021, Rev. Codes 1905, requiring the court to charge the jury in writing, is mandatory, and is intended to give the court opportunity to consider such request before instructing the jury.

Same.

9. If the defendant desired more explicit instructions than were given by the court, they should have been presented to the court in writing, with request that they be given.

Appeal from District Court, Foster county; *Burke, J.*

Action by P. J Carr and another against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Verdict for plaintiffs. From an order denying its motion for a new trial, defendant appeals.

Affirmed.

Lee Combs and *Alfred H. Bright*, for appellant.

There can be no recovery unless defendant's trainmen failed to exercise ordinary care to prevent injury to stock after they are discovered in a place of danger. *Wright v. Minneapolis, St. P. & S. Ste. M. Ry. Co.* 12 N. D. 159, 96 N. W. 324; *Peterson v. Wisconsin Cent. Ry. Co.* 56 N. W. 639; *Carey v. Chicago, M. & St. P. Ry. Co.* 20 N. W. 648; *Richardson v. Chicago & N.-W. Ry. Co.* 14 N. W. 176; *McMullen v. Dickinson Elevator Co.* 65 N. W. 663; *Bostwick v. Minneapolis & Pac. Ry.* 2 N. D. 440, 51 N. W. 781; *Hodgings v. Minneapolis, St. P. & S. Ste. M. Ry. Co.* 3 N. D. 382; 56 N. W. 139; *O'Leary v. Brooks El. Co.* 7 N. D. 554, 75 N. W. 919.

Contributory negligence was an issue in the case, and the instruction asked was proper. *Habenicht v. Chicago, St. P. & O. Ry.* 105 N. W. 910; *Richardson v. Chicago, M. & St. P. Ry. Co.* supra.

T. F. McCue, for respondent.

Permitting cattle to run at large is not of itself negligence. *Cameron v. Great Northern Ry. Co.* 8 N. D. 124, 77 N. W. 1016; *Kearns v. Southern Ry. Co.* 52 S. E. 131; *Johnson v. Chicago, M. & St. P. Ry. Co.* 13 N. W. 673; *Heath v. Coltenback*, 5 Ia. 490.

It is the duty of the carrier to keep a lookout. *Railroad Co. v. Watkins*, 29 S. W. 232; *Railroad v. Hewitt*, 67 Tex. 479; *Wright v. Railway*, 2 Am. & Eng. R. Cases, 121.

The question of negligence was properly submitted. *Bennett v. Chicago, M. & St. P. Ry. Co.* 66 N. W. 934; *Killbach v. Chicago, M. & St. P. Ry. Co.* 84 N. W. 192.

Contributory negligence is an affirmative defense, and must be alleged and proved by him who relies on it. *Ouverson v. City of Grafton*, 5 N. D. 281, 65 N. W. 676; *Gram v. Northern Pac. Ry. Co.* 1 N. D. 252, 46 N. W. 972; *Clark v. Canadian Pac. Ry. Co.* 69 Fed. 543.

SPALDING, J. This is an action for the killing of certain cattle and the injury of others, the property of the plaintiffs, by a railway train of the defendant, on the defendant's right of way in section 1, township 145, range 66. The verdict was for plaintiffs in the sum of \$90. Defendant's motion for a new trial was denied, and from this order defendant appeals.

In their complaint the plaintiffs allege damages in the sum of \$100, and charge the defendant, through its agents and employes, with carelessness and negligence in running and operating its train, which resulted in the killing and injury. The defendant answered, admitting the killing of certain cattle on the 7th day of November, 1903, and that they were, in their belief, the property of the plaintiff Carr, and charges them with trespassing on the right of way and railway tracks of the defendant at the time of such accident, and denies that the damages exceeded \$60, and, as to other allegations of the complaint, makes general denial. The case was tried to a jury, and the plaintiff Carr testified as to the date, location, killing, and injury, and that the damage was \$90. On cross-examination it was shown that he lived one mile south of the railway track, and had a section of land there, and the plaintiff Erickson had a half interest in the stock, and that at the time of the accident they were pasturing their cattle by letting them run at large on the prairie, and inclosing them in a corral at the house at night. The morning before the accident occurred the cattle had been turned out from the corral with no one in charge. There were 50 head, and they had been driven onto 320 acres of grass land south of the buildings on the side of the track where they were turned out. We infer from the

evidence that the track ran northwest and southeast. The other side was stubble land, and they had never been known before to go toward the railway track, and there was no fence between the corral and the premises and the railway track. The owners had kept watch of them, and none had been killed before. They had generally stayed south of the buildings until evening. One Murphy testified on behalf of plaintiffs that he was fixing a fence about 50 rods from where the accident occurred, and saw it. The train was a freight, and he thought it was making pretty good time, but was unable to estimate the speed at which it was running. When he first observed the train, the cattle were on the right of way, and the train was quite a little distance from the cattle, probably 60 or 80 rods. When he first noticed them on the right of way, he quit working and ran towards the train. The cattle and the train were running east. The train seemed to run faster after it got among the cattle. He also testified that the accident occurred between 2 and 3 o'clock, that the train sounded a signal, but as there was a crossing there, he did not know whether it was for the crossing or for the cattle. He also testified that the train stopped about a quarter of a mile from where it struck the first animal, and a man appeared to pull an animal from under the engine box, but the train got away before he reached it. On cross-examination he testified that it was a clear, bright day, of which he was sure. He thought the train was about a quarter of a mile from the cattle when the alarm was sounded, and testified that the track was straight with nothing to obstruct the view of the engineer, and that they appeared to put on more steam in an effort to catch the cattle. The plaintiffs rested, and the defendant moved the court to instruct the jury to return a verdict for the defendant, because the evidence showed the plaintiffs guilty of contributory negligence, which was the approximate cause of the injury complained of, and because there was no evidence to establish the fact that the defendant wrongfully or negligently caused the injury complained of. The court denied this motion, to which the defendant excepted, and assigned the ruling of the court as error.

By section 4297, Rev. Codes 1905, the killing or damaging of stock by cars or locomotives along the railroad is made *prima facie* evidence of carelessness and negligence on the part of the corporation. It therefore became necessary for the defendant to

overcome the *prima facie* case made by the plaintiffs, when they showed the killing and injury. Did it do so on the cross-examination of the plaintiff Carr and the witness Murphy? It is, in substance, contended by the appellant that it did. This contention is based largely upon the authority of *Wright v. Railway Co.* 12 N. D. 159, 96 N. W. 324, wherein the court held the plaintiff guilty of contributory negligence as a matter of law. We are unable to agree with the appellant's counsel in his opinion that the case above cited is authority in this case, for the reason that the facts are materially different. In that case, the buildings of the plaintiff were only 30 rods from the railway track, and the stock was known to be in the habit of going upon the right of way and had done so all winter, and the plaintiff "had seen them do so a good many times up to the day of the killing." and knew that his horse was in danger, and usually drove it out when he saw it on the right of way. Some of his cows had been killed by the defendant a short time before, yet he turned his horse out on the 14th day of April, the day of the accident, without watch or attendant, to follow his habit of going on the right of way. On that day both the plaintiff and his hired man saw his horse on the right of way, but made no endeavor to drive it out of its exposure to danger. The court held that by reason of the plaintiff having turned his horse out, in defiance of the law prohibiting it being at large at that season of the year, in a place of known danger, and with knowledge of its habit of going onto the right of way, to become a menace to the safety of the traveling public and to the rights of the common carrier, the plaintiff was guilty of contributory negligence which would defeat his recovery.

The case at bar, as relates to the acts of both plaintiffs and defendant, stands upon a different state of facts. The buildings of the plaintiffs from which the cattle were driven were one mile from the railway tracks, and the cattle had not before been known to go upon the right of way. There was no inducement for them to go, because it was stubble on that side, while it was grazing land upon the side where they were turned out. The evidence, as it stood at the time this motion was made, it seems to us, leaves the question of contributory negligence, if in the case at all, a proper one for submission to the jury. Contributory negligence, as well as negligence of the defendant, are questions for

the jury in a case at law, unless the conceded facts from which the inference must be drawn admit of only one conclusion. If the facts are such that different, impartial minds might fairly draw different conclusions from them, they should be submitted to the jury, and are only for the court when such that fair-minded men might draw only one conclusion from them. *Mares v. N. P. Ry. Co.* 3 Dak. 336, 21 N. W. 5; *Id.* 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296; *Heckman v. Evenson*, 7 N. D. 173, 73 N. W. 427; *Cameron v. Ry. Co.* 8 N. D. 124, 77 N. W. 1016; *Owen v. Cook*, 9 N. D. 134, 81 N. W. 285, 47 L. R. A. 646; *McKeever v. Homestake Mining Co.* 10 S. D. 599, 74 N. W. 1053; *Bohl v. Dell Rapids*, 15 S. D. 619, 91 N. W. 315; *Pyke v. City of Jamestown (N. D.)* 107 N. W. 359; *Sarja v. G. N. Ry. Co.* 109 N. W. 600, 99 Minn. 332. The defendant, by the cross-examination of the plaintiffs and the witness Murphy, had not overcome the *prima facie* case made against it under the statute, when the fact of the killing and injury by its train was shown, and the court rightly denied this motion. The engineer on one of the defendant's trains testified that on the 7th day of November, 1903, he was pulling a freight train from Enderlin to Harvey, and, when near Bordulac, he struck some cattle, and that it was between 11 and 12 o'clock in the forenoon of that day, and that he never knew to whom the cattle belonged; that he was running 28 or 30 miles an hour, and hauling 28 or 30 cars, mostly loaded and going east. He also testified that, when he first saw the stock, it was 20 or 25 car lengths from him, or about 40 or 50 rods, and that it was a very foggy day. The cattle were close to the right of way, the nearest one about 14 feet from the rails. He opened the cylinder cock, and blew out steam and made a noise, and most of them turned back, but three or four attempted to cross the track ahead of the train. When he noticed that the cattle were agitated and manifested a disposition to rush upon the track, it was absolutely impossible for him to stop the train, or avoid injuring them. He also testified that he thought it would take about 30 seconds or a little less to run the 45 rods, and that he did not stop his train, and pulled no animal from under the engine, and that it was in his judgment absolutely impossible to avoid injury under the circumstances, and that he did not apply more steam to increase the speed of the train, neither did he shut off steam. The cattle did not show any disposition

to go upon the track until he was about 25 or 30 feet from them. On cross-examination he testified that after he got 25 or 30 feet from them they ran 12 feet onto the track. He thought the train was about 45 rods from them when they were first seen, but that it might have been a little farther. He also testified that when he first saw them they were very close to the track, but that he made no effort to slow his train, and could not tell whether they were cattle or men; that he did not apply the air-brakes, and made no attempt to slow up to ascertain what the objects were; that he could not have stopped the train 60 rods from the cattle at the rate of speed that he was running at that place without difficulty, although he had never tried stopping such a train when he measured the distance, but had often tried to stop quickly; and that he sounded the whistle before he got among the cattle, and the cattle had not been running along ahead of the train on the track, but started to cross the track. The fireman testified that he did not see the cattle until the whistle sounded, as he was shoveling coal, and that it was then impossible to stop the train in time to avoid injury to the stock, and that he remembered the day was foggy. He did not know how far they were from the stock when the engineer first saw them. The plaintiff Carr was called in rebuttal, but his testimony was unimportant. After both parties rested, the defendant moved the court to direct a verdict in its behalf, on the ground of contributory negligence on the part of the plaintiffs, and because the presumption of the statute, regarding the killing of stock, had been rebutted, and the plaintiffs had failed to establish any negligence on the part of the defendant causing the injury, and also because from all the evidence the plaintiffs had failed to establish a prima facie case or to establish a cause of action by a fair preponderance of the evidence which entitled them to recover under the circumstances in the case as stated in their complaint, or otherwise. This motion was denied, exception taken, and the ruling assigned as error. The cases cited *supra* establish the law in this jurisdiction regarding negligence, as well as contributory negligence in its application to a directed verdict.

It will be observed that there was a conflict in the testimony as to the condition of the atmosphere on the day of the accident. If, as plaintiffs' witness testified, it was clear and bright, with a clear view of the track unobstructed for a very long distance, and

the engineer saw the cattle at so great a distance that he was unable to distinguish whether they were cattle or men, and then failed to make any effort to stop the train to avert the accident, it would be a clear case of negligence on the part of the defendant. On the other hand, if the day was foggy, and the engineer only saw the objects for the first time, when they were so close as to make it impossible to avoid the accident, the defendant would probably not be guilty of negligence justifying recovery. There was also a question of fact as to the train which the defendant's witnesses were operating being the train which did the damage. The testimony on that subject was in conflict as to the time of day, and whether the train was stopped after the accident. The jury might well have found, and for aught we know, did find, that the damage was done by some other train than the one run by defendant's witnesses. But these were disputed facts, and facts which had to be determined before a verdict could be rendered. The jury was there to find the facts, and it is clear to us that it would have been error on the part of the court to have granted the defendant's motion.

The next assignment of error relates to the instructions of the court to the jury, contained in the following paragraphs: "(1) The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is clearly responsible for the accident. The mere fact that the plaintiff was injured while trespassing on the defendant's premises, and would not have been injured if he had not been so trespassing, is not of itself enough to convict him of contributory negligence. (2) It is well settled that the plaintiffs may recover damages for injury caused by the defendant's negligence, notwithstanding the plaintiffs' own negligence in exposing their stock to injury, if such injury was approximately caused by the defendant's omission, after becoming aware of the danger of the plaintiffs' property, to use ordinary care for the purpose of avoiding injury. (3) If you believe from the evidence in this case that the railway company had its train properly equipped with airbrakes and modern appliances, and that after the stock was discovered to be in a place of danger said employees exercised ordinary care not to injure them, you must find for the defendant. If, on the other hand, you find from the evidence in the case that the defendant's employees did not use ordinary care not to injure the stock after they were discovered to

be in a place of known danger, it would be your duty to find for the plaintiffs in such sum as you would find they had been injured." These instructions appear to us to come within the rule in such cases, declared in *Bostwick v. Railway Company*, 2 N. D. 440, and the cases there cited and commented upon, and also in *Wright v. Ry. Co.*, *supra*, where the court announced the law applicable as follows: "The plaintiff's horse was a trespasser upon the defendant's right of way, and, as to it, the measure of defendant's duty was to exercise ordinary care not to injure it after it was discovered to be in a place of known danger." See, also, *Hodgins v. Ry. Co.*, 3 N. D. 382, 56 N. W. 139; *O'Leary v. Elevator Co.*, 7 N. D. 554, 75 N. W. 919, 41 L. R. A. 677. It is unnecessary for us at this time to make further comment upon the principles there discussed. We conclude that the court did not err in giving these instructions, and particularly when taken in connection with other portions of the charge. See, also, *Sarja v. G. N. Ry. Co.*, *supra*.

The trial court, among other things, in addition to portions of the charge on which error is assigned, instructed the jury that the fact that the "cattle were trespassing upon the track does not absolve the company from preventing injury upon them, if by the exercise of due care, it could be avoided. What is due care on the part of the company under such circumstances is necessarily a question of fact, and depends upon the circumstances of each case. Gentlemen, you are the judges of the facts in this case, and probably the pivotal fact in this case to be determined is this: Did the railway company through its employees use ordinary care to prevent injury to the stock after they discovered them in a position of danger? The defendant's duty was to exercise ordinary care not to injure said stock after it was discovered to be in a place of known danger. As to whether or not the defendant's engineer discovered the stock in due time to avoid injuring them is a question of fact for you to decide. It is also a question of fact for you to decide when [whether] these cattle were in a place of danger. That is the pivotal question in this case." During the delivery of the charge to the jury, counsel for defendant interrupted the court with an inquiry regarding instructions concerning contributory negligence, and, after the completion of the charge, he requested the court orally to instruct the jury that, under no circumstances can the plaintiffs recover, if it appears that this injury was due to contributory negligence of plaintiffs in permitting the

stock to run at large, trespassing upon defendant's tracks, knowing the danger and hazard that they were subject to by so doing. The court refused this request, and such refusal is assigned as error.

The defendant did not plead contributory negligence as a defense, and, for this reason, it was not entitled to an instruction on the subject. Vol. 11, Enc. Pl. & Pr. p. 162, n. 1, and cases cited. Section 7021, Rev. Codes 1905, requires the court to charge the jury only as to the law in the case, and prohibits any instruction in a civil case, unless it has first been reduced to writing, and provides that either party may request instructions to the jury, but that each instruction so requested must be in writing and on a separate sheet. This is a salutary provision of law intended to give the court opportunity to consider any requests for instructions, and is mandatory. Vol. 11, Enc. Pl. & Pr. p. 254. But even if the failure of the defendant to plead contributory negligence did not relieve the court of the duty of giving instructions on that subject, if properly requested, it was not error under the circumstances to refuse the oral request. The court had fairly covered the law applicable to the case, and, if the defendant desired more explicit instructions on the subject, they should have been presented to the court in writing with a request that they be given. Vol. 11, Enc. Pl. & Pr. p. 261, n. 7; *McCummins v. State* (Wis.) 112 N. W. 25. We fail to find any prejudicial error in the record.

The order of the district court denying defendant's motion for a new trial is affirmed, with costs to plaintiffs. All concur. (112 N. W. 972.)

COLEAN MANUFACTURING COMPANY v. M. L. FECKLER, ET AL.

Opinion filed July 18, 1907.

Judgments — Setting Aside Default — Terms.

Trial courts are vested with a broad discretion in relieving parties from defaults taken against them and in imposing term costs as a condition to such relief; but under the facts in this case it was an abuse of discretion to impose upon plaintiff the payment of \$100 terms as a condition to relieving it from a default judgment taken against it. Order modified, to the extent of requiring the payment of only the statutory costs and disbursements properly taxable in default cases.

Appeal from District Court, Barnes county; *Burke, J.*

Action by the Colean Manufacturing Company against M. L. Feckler and others. From that portion of an order imposing costs as a condition to vacation of the default judgment against plaintiff, he appeals.

Modified.

Turner & Wright, for appellant.

Parks & Olsberg, for respondents.

FISK, J. This is an appeal from that portion of an order made by the district court of Barnes county on January 2, 1907, imposing term costs of \$100 on plaintiff as a condition to the vacation of a default judgment theretofore taken against the plaintiff; appellant's contention being that this portion of the order was an abuse of discretion. The facts, as stated in appellant's brief and conceded to be correct by respondents' counsel, are as follows: On December 22d, being a regular day of the December term, the case was called for trial and defendants appeared in person and by their attorneys, Parks & Olsberg. The plaintiff did not appear either in person or by attorney, and a jury was impaneled and sworn to try the cause, and the jury returned a verdict in favor of the defendant, and judgment was ordered and entered thereon against plaintiff in the sum of \$61.45, costs and disbursements. On December 26th, on application of plaintiff's counsel, an order was issued by the district court requiring defendants to show cause on December 27th, at 10 o'clock a. m., if any they had, why plaintiff should not be relieved from the judgment taken against it. Upon the hearing of such order to show cause the order complained of was made. Plaintiff's counsel, Turner & Wright, reside in the city of Fargo. This firm were attorneys in eight cases upon the calendar of this December term of said court, of which five, including the case at bar, were jury cases, and they were ready for trial in each of said cases. A day or two before the opening of said term, Mr. Wright, the member of said firm having charge of these cases, wrote the state's attorney of said county relative to the time which would probably be consumed in the trial of criminal cases, and was informed that such cases would be moved for trial at the opening of the term and disposed of as rapidly as possible. Fourteen criminal cases appeared on said calendar. On December 14th, Mr. Wright proceeded to Valley City, where he remained on other business until the evening of December 15th.

While there he was informed by the trial judge that the criminal calendar would be completed by Saturday evening, December 15th. Mr. Wright returned to Fargo after being informed that there were set cases for the following Monday which would probably occupy several days in the trial thereof; but to be doubly sure, on Sunday, December 16th, he called the trial judge over the telephone and was informed by him that these cases would occupy at least three days. He at that time stated to the judge that he desired to try his cases at that term of court, and desired only that he have notice and an opportunity to get to Valley City to try them. The judge acquiesced in this arrangement. On December 19th Mr. Wright called the clerk of said court over the telephone for information as to the state of the calendar, and was informed that the set cases mentioned would be followed by a civil action for libel which would probably consume about three days. On Thursday, December 20th, this firm were notified that three of their other cases might be reached for trial on the following day. Thereupon Mr. Wright notified his witnesses in these cases, as well as in the case at bar, to be at Valley City Friday morning; Mr. Wright going to Valley City Thursday evening. Upon his arrival there he was informed by the trial judge that none of his jury cases had been set for trial. Mr. Wright, however, remained in Valley City that night and attended court during the forenoon of Friday, December 21st, and had with him his witnesses ready for the trial of the case at bar. About 11 o'clock in the forenoon he informed the trial judge that he could leave for Fargo in about twenty minutes, as a train was due to depart at that time, and he inquired if there was any possibility of any of his cases being reached, either on that day, Friday, or on Saturday, the day following. He was informed by the judge that there was not. He and his witnesses then returned to Fargo, leaving Valley City at about 12 o'clock. That same afternoon he was notified by telephone that the case at bar had been set for trial the next day. This notification was given by Mr. Parks, one of defendant's attorneys, at about 3 o'clock in the afternoon. Mr. Wright, in his conversation with Mr. Parks, informed the latter that he could not go to Valley City before train No. 3 on Saturday morning, which train was scheduled to arrive at Valley City at 7:50. Mr. Parks stated in this conversation that, should anything happen to make this train late, he had another case which he thought

he could sandwich in ahead of it. Mr. Wright went to Valley City on train No. 3 Saturday morning, but this train was late in leaving Fargo and did not arrive in Valley City until about 11:50 a. m. Mr. Parks informed the judge that Mr. Wright would arrive on train No. 3. Mr. Parks was entirely willing to await the arrival of this train before beginning the trial of the case. The trial judge, upon receiving information from the agent of the railroad company at Valley City that this train would not arrive until about noon, peremptorily ordered defendants' counsel to at once proceed to the trial of the action or else it would be placed at the foot of the calendar. Thereupon proceedings were had as before stated. No other business was transacted by the court that day, the jury having been discharged before noon, until the following Wednesday. The reasons assigned by the trial judge for ordering the trial to proceed without awaiting the arrival of plaintiff's counsel was to enable him to give the jury an extra half day's holiday.

In the light of the foregoing facts it is too clear for discussion that the trial judge properly granted plaintiff's motion to vacate such default judgment. Indeed, to have denied this relief would have been a manifest abuse of discretion. Respondents' counsel do not contend to the contrary, but they assert that the court, in imposing terms of \$100 as a condition to the granting of such relief, acted within a sound discretion, and hence that such order should not be modified by this court. Was it an abuse of discretion to impose any terms? And, if not, were the terms imposed reasonable? These are the sole questions for our determination. It is true, as contended for by respondents' counsel, that trial courts in matters of this kind are usually vested with a broad discretion; but it is well settled that such discretion must be exercised within the bounds of reason and in furtherance of justice. It appears that respondents were in no manner to blame for the situation in which the parties find themselves. Respondents' counsel did not force the case to trial, but, on the other hand, it appears that they were entirely willing to await the arrival of the belated train carrying plaintiff's counsel; but the court insisted upon disposing of the case at once. It would be manifestly unfair, therefore, to defendants, to vacate such default and reinstate the case for trial without the imposition of some terms. On the other hand, it is a hardship to plaintiff to be forced to pay term

costs when it and its counsel were in the exercise of such due diligence as is disclosed by this record. In view of the facts we think it was an abuse of discretion to impose terms in excess of the statutory costs and disbursements which defendants could properly tax in case of default. The payment of such sum would undoubtedly place defendants in as advantageous a position as they would have been in if plaintiff had commenced its action anew, which, of course, it had a perfect right to do. Upon plaintiff's default the proper practice was to take a dismissal of the action, as defendants did not ask for any affirmative relief. Upon such dismissal the only items which could be legally taxed as costs and disbursements against plaintiff would be those taxed in this case in the court below, less the item of \$5 taxed for "trial of an issue of fact." There could properly be no trial; hence this item should be excluded. To impose terms in excess of these items amounted to the imposition of a penalty as a condition to the granting of relief to which plaintiff was clearly entitled and the granting of which in no manner prejudiced defendants.

The trial court is directed to modify the order appealed from to conform to this opinion; the costs of this appeal to abide the final result of the case. All concur.

(112 N. W. 993.)

GEORGE OLSON v. ERIC MATTISON AND LYE STORBY.

Opinion filed July 18, 1907.

Appeal — Appealable Order.

1. An order refusing to set aside a judgment rendered after a trial and verdict is not appealable, when such order is based on a motion to set aside the judgment on the ground that the special verdict on which the judgment was entered did not warrant the entry of judgment thereon.

Judgment — Correction — Motion — Scope of Remedy.

2. Irregularities in the rendition of judgment may be corrected by motion; but the correction of errors of law occurring at the trial, or in framing or receiving special verdicts, or in entering judgment thereon, can only be made by appeal or motion for a new trial.

Appeal from District Court, Ward county; *Goss*, J.

Action by George Olson against Eric Mattison and Lye Storby.
Judgment for plaintiff, and defendants appeal.

Dismissed.

LeSueur & Bradford, for appellants.

James Johnson, for respondent.

MORGAN, C. J. This is an appeal from an order of the district court of Ward county denying a motion to set aside a judgment entered after a trial and upon a verdict rendered in favor of the plaintiff. The verdict was returned into court on the 8th day of December, 1905, and on the 11th day of December, 1905, the plaintiff secured an order to show cause why judgment should not be rendered in favor of the plaintiff pursuant to the verdict, and said order to show cause was duly served upon the defendants. On the 14th of December, 1905, the parties appeared before the court pursuant to said order to show cause, and the defendants made objections to the entry of judgment upon the verdict. After hearing the parties on said order to show cause, the court ordered that judgment be entered on the verdict, and judgment was entered on the 15th day of December, 1905, and notice of the entry of said judgment was duly served on the defendants on the same day. On the 24th day of January, 1906, the defendants made a motion in the district court to vacate, dissolve, and set aside said judgment upon the ground that the same was not supported by the special verdict upon which the judgment was based. This motion came on for hearing and was duly denied by the court. The defendants appealed to this court from said order refusing to set aside the judgment on that ground.

The plaintiff moves to dismiss this appeal on the ground that the order refusing to set aside the judgment is not an appealable order. The motion is granted. There is no statutory provision permitting the practice of setting aside by motion judgments entered after a trial, for errors of law committed at the trial. Whether the special verdict was framed in accordance with established procedure, and whether the same was in all respects sufficient to warrant the entering of judgment thereon, are strictly questions of law. If the special verdict was not sufficient on which to base a judgment, the entering of judgment on such verdict was an error of law, and such error can only be corrected on a motion for a new

trial or by appeal from the judgment. It is only irregularities in the entering of judgment that may be corrected by motion. As stated in *State v. Donovan*, 10 N. D. 203, 86 N. W. 709, the rule is: "The remedy by motion, however, is available only in case of irregular judgments, and cannot be resorted to as a means of enabling the trial court to review, revise or correct errors of law into which it may have fallen. See, also, 1 Black on Judgments, section 329, and cases cited; *Goyhinech v. Goyhinech*, 22 Pac. 175, 80 Cal. 409, 410; *Reay v. Butler*, 11 Pac. 463, 69 Cal. 572; *May v. Stimson Lumber Co.*, 119 N. C. 96, 25 S. E. 721.

The contention that this was a judgment entered without jurisdiction cannot be sustained. The court had jurisdiction of the parties and the subject-matter, and the fact claimed, that the verdict was not such a special verdict as would warrant the entering of judgment thereon, would not be such an error as would render the judgment void, but simply erroneous. The appellant claims that the appeal was properly taken under the provisions of subdivision 2, section 7225, Rev. Codes 1905, granting an appeal from a "final order affecting a substantial right in special proceedings or upon a summary application in an action after judgment." This is not an order coming within the application of said section or subdivision. Appeals under the last part of subdivision 2 are from orders made that are based on matters occurring after judgment, or matters referring to opening up default judgments. In no case have we found that it applies to remedy errors of law occurring at the trial or in entering up judgment.

The appellant also contends that the judgment was rendered through a mistake under the provisions of section 6884, Rev. Codes 1905, authorizing the court or judge to set aside a judgment rendered through his "mistake, inadvertence, surprise, or excusable neglect." As seen by the reading of this section, it refers to mistakes or negligence of the party, and not to the mistakes of the court on a trial.

For these reasons, the appeal is dismissed. All concur.
(112 N. W. 994.)

NOTE—An order refusing an application for judgment upon the findings of a jury is non-appealable. *Persons v. Simmons*, 1 N. D. 243, 46 N. W. 969. An order refusing to vacate an order dismissing an appeal from justice court is non-appealable. *Insurance Co. v. Weber*, 2 N. D. 239, 50 N. W. 703. An order punishing for contempt in disobeying an injunction

- for vindication of the authority of the court and not in a proceeding in the interest of a party, is not appealable. *State v. Davis*, 2 N. D. 461, 51 N. W. 942. An order of the district court dismissing an appeal from a justice of the peace is not appealable. *In re Weber*, 4 N. D. 119, 54 N. W. 523; *Lough v White*, 13 N. D. 387, 100 N. W. 1084; *Feld v. Elevator Co.*, 5 N. D. 400, 67 N. W. 147; *Prondzinski v. Garbutt*, 9 N. D. 239, 83 N. W. 23. An appeal does not lie from an order in overruling a demurrer to a written accusation under section 7838, Rev Codes, for removal of a county officer for malfeasance. *Myrick v. McCabe*, 5 N. D. 422, 67 N. W. 143. An order for judgment is not appealable. *In re Eaton*, 7 N. D. 273, 74 N. W. 870. Nor an order dismissing an action for failure of proof. *Cameron v. Ry. Co.*, 8 N. D. 124, 77 N. W. 1016; *Hamburg v. Bank*, 8 N. D. 238, 79 N. W. 340. Final order in habeas corpus case is not appealable. *Carruth v. Taylor*, 8 N. D. 166, 77 N. W. 182. An appeal cannot be taken from an order bringing in an additional defendant under Sub. 1, section 5626, R. C. *Bolton v. Donoval*, 9 N. D. 575, 84 N. W. 357. An order denying a motion to vacate an injunctive order is not appealable. *Tracy v. Scott*, 13 N. D. 577, 101 N. W. 905.

NOTE—An order vacating an attachment is appealable. *Bank v. Freeman*, 1 N. D. 196, 46 N. W. 36. An order confirming sale of real estate on execution is appealable. *Dak. Inv. Co. v. Sullivan*, 9 N. D. 303, 83 N. W. 233. An order settling the final account of a receiver is an appealable order. *Patterson v. Ward*, 6 N. D. 359, 71 N. W. 543. An order to show cause why respondent should not be punished for contempt for violating an injunction is appealable. *Merchant 1. Pielke*, 9 N. D. 245, 83 N. W. 18. An order punishing an attorney for contempt made during trial is appealable by party aggrieved. *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085. An order granting a change of venue is appealable. *Robertson Lumb. Co. v. Jones*, 13 N. D. 112, 99 N. W. 1082.

M. KELLY AND JAMES McLAUGHLIN, COPARTNERS AS KELLY & McLAUGHLIN v. T. E. PIERCE AND L. S. CHAMPINE, CO-PARTNERS AS PIERCE & CHAMPINE.

Opinion filed July 18, 1907.

Appeal — Instructions — Abstract.

1. Errors in giving instructions must be affirmatively shown by the abstract, and the court will not explore the record to substantiate assignments of error.

Same — Waiver of Error.

2. Errors assigned in the brief, but not argued, will be deemed abandoned.

Sale — Agreement to Give Notes — Damages.

3. A vendee who refuses to perform his agreement to execute notes for the purchase price of personal property sold and delivered to him, may be sued by the vendor for damages for breach of the contract immediately upon the refusal to deliver the notes, and the measure of damages will be the contract price.

Partnership — Good Will.

4. A partner has no power, as such alone, to sell the good will of the partnership business.

Appeal — Error Without Prejudice.

5. Submitting the measure of damages to a jury on a wrong theory is error without prejudice, where the result attained is the same as would necessarily have followed, had the question not been submitted to the jury at all.

Appeal from District Court, Cavalier county; *Kneeshaw, J.*

Action by M. Kelly and James McLaughlin, co-partners as Kelly & McLaughlin, against T. E. Pierce and L. C. Champine, co-partners as Pierce & Champine. Judgment for plaintiffs. Defendants appeal.

Affirmed.

Cleary & McLean, for appellants.

Dependent conditions must be complied with before seller is bound to part with his goods. *Davis v. Jeffris*, 58 N. W. 815; *Osborne v. Martin*, 56 N. W. 905; *Wernli v. Collins*, 54 N. W. 365.

Plaintiff cannot recover on quantum meruit. *Wernli v. Collins*, *supra*; *Morrow v. Board of Education*, 64 N. W. 1126; *Prairie v. Haselem*, 3 N. D. 328, 55 N. W. 938.

Gordon & McIntyre, for respondents.

Appellant must embody in his abstract sufficient facts to sustain error claimed. *Ashe v. Beasley*, 6 N. D. 191, 69 N. W. 189; *Erickson v. Citizens National Bank*, 9 N. D. 81, 81 N. W. 46; *State v. Campbell*, 7 N. D. 58, 72 N. W. 935.

Appellate courts favor every presumption necessary to support the judgment. *Gaar, Scott & Co. v. Spalding*, 2 N. D. 414, 51 N. W. 867; *Clyde v. Johnson*, 4 N. D. 92, 58 N. W. 512.

Where property is sold to be paid for in notes, action may be brought on refusal to execute them. 24 Am. & Eng. Enc. Law, 1123; *Stevenson v. Repp*, 10 L. R. A. 620; *Hanna v. Mills*, 21 Wend. 90; 3 *Parsons Cont.* (6th Ed.) 211.

Measure of damages is the contract price for the goods sold. *Stevenson v. Repp*, *supra*; *Carnahan v. Hughes*, 9 N. E. 79; *Barrown v. Mullin*, 21 Minn. 374; 2 *Benjamin Sales*, paragraph 1127; 24 Am. & Eng. Enc. Law, 1125.

MORGAN, C. J. The plaintiffs sold and delivered to the defendants some horses, buggies, and other personal property used in the running of a livery barn in the city of Langdon for the agreed price of \$1,550. The terms of the sale were that the defendants were to execute to the plaintiffs two promissory notes, each for the sum of \$775, one due on or before one year from the date of the sale, June 16, 1904, and the other due two years from the date of sale, each to bear interest at the rate of 8 per cent per annum. All of the property embraced in the sale was delivered to the defendants immediately after the terms of sale were agreed upon. The defendants refused to execute and deliver the notes as agreed. The plaintiffs bring this action for damages for their refusal to comply with the terms of the sale by executing and delivering to the plaintiffs the notes, and demand a recovery of judgment against the defendants for the sum of \$1,550, with interest from the date of sale. Said sum is sought to be recovered as damages growing out of the breach of contract. The defendants answer, and admit their refusal to execute and deliver the notes, and further allege that their refusal was based upon the fact that the plaintiffs had failed to comply with the terms of the contract. It is alleged in the answer that when the sale was made, and as a part of the consideration thereof, the plaintiffs agreed to cease doing any livery business and any feed business in Langdon, and further agreed to make, execute, and deliver to the defendants their undertaking that they would comply with the agreement to cease doing any livery or feed business. A jury was impaneled and testimony taken, and at the close of the taking of the testimony the plaintiffs made a motion for a directed verdict, which was denied. Thereupon the plaintiffs asked leave to reopen the case for the taking of further testimony. This motion was objected to by the defendants, and the objection overruled, and the

defendants excepted to such ruling. Further testimony was taken as to the value of the property delivered to the defendants pursuant to such sale, and at the close of the taking of such testimony the plaintiffs again moved for a directed verdict upon all of the issues raised by the pleadings except the single one of the value of the property delivered to the defendants. This motion was granted, and the issue as to the value of the property was submitted to the jury. A verdict was returned for the sum of \$1,550, and judgment was rendered pursuant to such verdict. After the jury brought in its verdict the defendants moved for judgment notwithstanding the verdict, or for a new trial in case such motion was denied, and there was no ruling upon the motion for judgment notwithstanding the verdict. A motion for a new trial was subsequently made and denied. Judgment was rendered upon the verdict, and the defendants have appealed from the judgment. The assignments of error relate principally to the refusal of the court to direct a verdict. There are other assignments which relate to the admission of testimony and the refusal to admit testimony, and there are also objections to the charge.

The objections to the charge will not be considered, as the charge is not set forth in the abstract; but the court is referred to the original record as to what the charge was. The charge, when excepted to, should be made a part of the abstract. The appellant, through his abstract, must affirmatively show that error was committed by the trial court, and the court will not ordinarily explore the record to substantiate an assignment of error. The error should affirmatively appear in the abstract. The objections to the charge will, therefore, not be considered. There are other assignments of error which are in the same situation; that is, they are not affirmatively shown by the abstract, and the court is asked to examine the original record to substantiate the assignments. All these assignments will be disregarded. The motion for a new trial is not contained in the abstract, and the grounds thereof do not appear outside of the record. There is no specification as to the particulars in which it is claimed that the verdict is not sustained by the evidence. For this reason it does not appear that it was error to deny the motion for a new trial, and, further, the denying of the motion for new trial is not assigned as error in the brief; the appeal being from the judgment.

The principal contention which was raised by the motion to direct a verdict was that the plaintiffs failed to comply with the terms of the contract of sale. As stated before, this contention is based upon the alleged fact that the plaintiffs agreed, as a part of the contract, to furnish a bond to discontinue doing a livery and feed business. This raises a question of law as to whether there was a conflict in the evidence that made it incumbent upon the trial court to submit that issue to the jury. Upon a careful consideration of the evidence, we are agreed that there was no conflict in the evidence on this question. There was some talk with the plaintiff Kelly before the sale was consummated as to the giving of a bond for the purpose stated, but the sale was not finally negotiated by the plaintiff Kelly, but was agreed upon and consummated between the plaintiff McLaughlin and the defendants, and the negotiations with Kelly were in no way made a part of the final contract with McLaughlin. It is admitted by the plaintiffs that they were willing to give a bond to discontinue doing any livery business, but the evidence shows that this conversation was had after the sale had been consummated, and that it was in no way a part of the original contract of sale, and there is no evidence in the record to show that it was agreed by them not to do any feed store business. This agreement was not a part of the contract of sale, and the evidence does not show that the plaintiffs agreed to give this bond before the notes were to be delivered; that is, it was not understood or agreed upon that the giving of the bond was a condition precedent to the giving and delivering of the notes. The defendants do not testify that the giving of the notes was to be dependent upon the giving of the bond. There was, therefore, no agreement as to the sale of the good will of the business, nor for the giving of a bond. Even if it be conceded that the plaintiff McLaughlin, on behalf of his firm, agreed to refrain from thereafter doing any feed and livery business, the contract would not be of any effect, as, under the express terms of section 5836, Rev. Codes 1905, one partner has no power to dispose of the good will of the business; hence the contract would be void, if it had been made, as it is not contended that the plaintiff Kelly even agreed to retire from the feed business, and he has at all times maintained that he desired to continue in the feed business, and has at all times refused to consent to retire from that business, and the record shows that he never so agreed, and

it further shows that the plaintiff McLaughlin refused to make such a contract unless agreed to by his copartner. This assignment is, therefore, not tenable.

It is further contended that the court submitted the case to the jury upon a theory which is at variance with the issues as made up by the pleadings. The allegations of the complaint state a cause of action for damages for a breach of the terms of a sale. The court submitted the question to the jury of the value of the property sold at the time of the sale, on the theory that the measure of damages on a breach of contract of sale was the value of the property sold at the time of sale. There is some conflict in the authorities as to what the measure of damages is upon the refusal of the buyer to execute notes for the purchase price of personal property, which were to be given for the price of them. We find that the great weight of authority is to the effect that, upon repudiating the agreement to execute notes, the vendor may at once sue for damages for breach of the contract. The vendor may withdraw his agreement to give credit upon the failure of the vendee to complete the contract according to its terms. We deem this the better rule, as it gives to each party the fruits of the contract. The following authorities fully substantiate this rule as to the remedy, as well as to the measure of damages: *Hanna v. Mills*, 21 Wend. (N. Y.) 90, 34 Am. Dec. 216; *Foster v. Adams*, 15 Atl. 169, 60 Vt. 392, 6 Am. St. Rep. 120; *Young v. Dalton*, 18 S. W. 819, 83 Tex. 497; *Hays v. Weatherman*, 14 Ind. 341; *Carnahan v. Hughes*, 108 Ind. 225, 9 N. E. 79; *Meacham on Sales*, section 1664; *Barron v. Mullin*, 21 Minn. 374; *Parsons on Contracts* (6th Ed.) 211; 24 Am. & Eng. Enc. Law, p. 1123, and cases cited; *Stephenson v. Repp*, 10 L. R. A. 620, 47 Ohio St. 551, 25 N. E. 803. The contract price, as stated, was \$1,550, and the jury found the value of the property to have been \$1,550 when sold. Conceding, for the purposes of the case, that the reopening of the case, and the taking of testimony after the case was reopened, was properly objected to and erroneous, still the defendants have not been prejudiced by the verdict of the jury. If the question had been submitted to the jury as to the value of the property, the trial court must have directed a verdict in plaintiff's favor for the same sum that the verdict was rendered for, under the evidence which was before the jury when the motion to direct a verdict for the plaintiff was made, and when the motion to reopen the case was

made. If it was error to submit the question to the jury, it was clearly an error without prejudice, and the defendants show no ground for their claim that they were prejudiced by such ruling. In submitting the case to the jury under a wrong measure of damages, there was no prejudicial error. The variance from the measure of damages pleaded was also without prejudice.

It was not prejudicial error on the part of the trial court in omitting to rule upon the motion for judgment notwithstanding the verdict, as that motion presented the same question for decision as had been denied on the motion for a directed verdict, and the same question as was passed upon on the motion for a new trial. The denying of the motion for a new trial was in effect and substance a denial of the motion for judgment. We have examined the assignments of error based upon the admission and rejection of evidence relating to the value of the property when sold, and find them without merit. Inasmuch as it was erroneous not to direct a verdict in plaintiff's favor for the contract price of the property, an error in the admission of evidence on the question of value would become immaterial.

This disposes of all the questions which have been properly presented to this court on the appeal. The others have not been properly raised, as stated before, or have been abandoned by the failure to rely upon them in the printed argument.

It follows that the judgment must be affirmed; and it is so ordered. All concur.

(112 N. W. 995.)

A. BESANCON V. N. C. WEGNER, ADMINISTRATOR OF THE ESTATE
OF HENRY G. KALBFLEISCH, DECEASED.

Opinion filed July 18, 1907.

**Executors and Administrators — Estate Not Primarily Liable for Their
Attorney's Fees.**

The estate of a decedent is not primarily liable for legal services rendered for the benefit of such estate at the request of the personal representative. Such services are performed for and on behalf of the executor or administrator, who is personally liable for the payment thereof, and for all such reasonable expenditures he is entitled to reimbursement from the estate.

Appeal from District Court, Bottineau county; *Burke, J.*

Action by A. Besancon against N. C. Wegner, as administrator of the estate of Henry G. Kalbfleisch. From a judgment in plaintiff's favor, defendant appeals.

Reversed, with directions to dismiss the action.

N. C. Wegner, for appellant.

A. Besancon, pro se.

FISK, J. Plaintiff by this action seeks to hold the defendant liable for the value of legal services performed by plaintiff's assignor, for the benefit of the estate of one Henry G. Kalbfleisch. Such services were performed at the special instance and request of one Katherine Kalbfleisch, formerly executrix of such estate. The action was evidently commenced and the complaint framed upon the theory, that the estate is primarily liable for the value of such services. Defendant demurred to the complaint upon the ground that the same fails to state facts sufficient to constitute a cause of action. The trial court overruled this demurrer and gave judgment in plaintiff's favor for the sum prayed for in the complaint, from which judgment this appeal is taken.

The sole error assigned is the overruling of such demurrer. It is clear that this ruling was error. The estate is not primarily liable for the value of these services, although the same were performed for the benefit of such estate at the request of the former executrix thereof. Such executrix became personally and primarily responsible for the payment of these attorney fees. The services were performed for and in her behalf for the purpose of assisting her in the execution of her trust. True, she was entitled to reimbursement out of the assets of the estate for all reasonable expenses of the administration thereof, including reasonable attorney fees for legal services necessarily rendered at her request. But such fees and expenses are allowed to her, and not to her attorney, and the attorney has no cause of action against the estate for the recovery of the value of such services. The authorities are practically unanimous in holding to the rule here expressed. 18 Cyc. 273, and cases cited; *McKee v. Soher*, 71 Pac. 438, 138 Cal. 367; *Briggs v. Breen*, 56 Pac. 634, 123 Cal. 657; *Woerner on American Law of Administration*, citing *Thomas v. Moore*, 52 Ohio St. 200, 39 N. E. 803; *Pike v. Thomas*, 62 Ark. 223, 35 S. W. 212, 54 Am. St. Rep. 292; *Tucker v. Grace*, 61 Ark. 410, 33

S. W. 530; Lusk v. Patterson, 2 Colo. App. 306, 30 Pac. 253; Miller v. Tracy, 86 Wis. 333, 56 N. W. 866; Wait v. Holt, 58 N. H. 467; Guernsey v. Maloney, 38 Cal. 85, 88, 99 Am. Dec. 352; Page's Estate, 57 Cal. 238; Austin v. Munro, 47 N. Y. 360, 366; Parker v. Day, 155 N. Y. 383, 49 N. E. 1046. This author cites as holding to a contrary view the cases of Portis v. Cole, 11 Tex. 157, and Long v. Rodman, 58 Ind. 58, also, Nichols v. Reyburn, 55 Mo. App. 1, in which latter case one of the judges dissented. Counsel for respondent evidently now concedes the correctness of the foregoing views, as he has filed no brief, but has filed with the clerk of this court a written stipulation consenting to a reversal of the judgment, upon the grounds stated in appellant's brief.

The judgment is hereby reversed, and the district court is directed to dismiss the action. All concur.

(112 N. W. 965.)

OLE L. BREMSETH AND ANNA BREMSETH v. O. B. OLSON, SHERIFF
OF TRAILL COUNTY.

Opinion filed Aug. 12, 1907.

Homestead — Head of Family — Fee in Wife.

Under the constitution and laws of this state, the husband as the head of the family is entitled to claim as exempt from execution sale the homestead, although the fee thereto is vested in his wife.

Action by Ole L. Bremseth and Anna Bremseth against O. B. Olson, sheriff of Traill county. Judgment for defendant and plaintiffs appeal.

Reversed.

E. P. Totten, for appellants.

It is the homestead, not the head of a family, which is protected. Wilson v. Cochrane, 31 Tex. 678; Crane v. Waggoner, 33 Ind. 83; Stout v. Rapp, 23 N. W. 364.

The homestead exemption is not dependent upon any claim made as against a levy. Ferguson v. Kumler, 25 Minn. 183.

A liberal rule of construction of homestead statutes almost universally prevails. 9 Am. & Eng. Enc. (1st Ed.) 519; 21 Cyc. 461; Waples on Homesteads and Exemptions, 29; Folsom v. Asper, 71

Pac. 315; Broome v. Davis, 13 S. E. 749; Hixon v. George, 18. Kan. 253.

It makes no difference that the title is in the wife. Broome v. Davis, *supra*; Hixon v. George, *supra*; Powers v. Sample, 12 So. 337; Kendall v. Powers, 8 S. W. 793; Orr v. Shraft, 22 Mich. 260; Ball v. Lowell, 56 Tex. 579; Henderson v. Rainbow, 41 N. W. 29.

If wife instead of husband was the debtor, homestead would be protected. Orr v. Shraft, *supra*; Crane v. Waggoner, *supra*; Tourville v. Pierson, 39 Ill. 446; Partee v. Stewart, 50 Miss. 721; Murray v. Sells, 53 Ga. 257; Dwinnell v. Edwards, 23 Ohio St. 603; Stout v. Rapp, *supra*; Waples on Homesteads and Exemptions, 65; Thompson on Homesteads and Exemptions, 187.

P. G. Swenson, for respondent.

Husband is not entitled to exemption in wife's land. Davis v. Dodds, 20 Ohio. St. 473; Turner v. Argo, 14 S. W. 930; Barry v. Western Assurance Co., 49 Pac. 148; McGinnis v. Wood, 47 Pac. 492; Producers Natl. Bank v. Cumberland Lbr. Co., 45 S. W. 981; Bennett v. Georgia Trust Co., 32 S. E. 625.

Wife not entitled to homestead because not the head of a family. Producers Natl. Bank v. Cumberland Lbr. Co., 45 S. W. 981; Ness v. Jones, 10 N. D. 587, 88 N. W. 706.

FISK, J. This action was commenced in the district court of Traill county, the object of which was to obtain an injunction perpetually restraining the respondent, as sheriff of Traill county, from selling under an execution issued upon a judgment rendered in an action wherein one M. E. Acker was plaintiff and these appellants were defendants. The complaint alleged that appellants are husband and wife, and during all the times mentioned in the complaint were residing with their children upon the land described in the complaint, said real property being the family home; that the appellant Anna Bremseth is the owner in fee of the property in question, being 80 acres situate in Traill county, this state, worth and of the value of not to exceed \$3,000, and that the same is farming land, and that the appellant Ole L. Bremseth during all the time mentioned in the complaint was and is the head of the family, consisting of his wife, himself and two children; that the defendant is sheriff of Traill county, and, as such sheriff, pursuant to an execution issued upon a judgment rendered in said action, had

levied upon said real property and had advertised the same for sale to satisfy such judgment; that said judgment was not obtained upon a debt secured by mechanic's or laborer's lien for work or labor done or improvements furnished for the improvement of said real property, nor was it obtained for a debt secured by a mortgage thereon, nor on a debt created for the purchase price thereof. A demurrer was filed to plaintiffs' complaint, upon the ground that such complaint fails to state facts sufficient to constitute a cause of action. An order was issued requiring the defendant to show cause why he should not be restrained, during the pendency of this action, from selling said real property under said execution, and a temporary restraining order was issued, but, upon the hearing of such order to show cause, the relief prayed for was denied and the temporary restraining order dissolved, and it is from this order that this appeal is taken.

The facts are not in dispute; the sole controversy being as to whether appellants, or either of them, are entitled to claim the real property in question as exempt. If the legal title to the property was in the appellant Ole L. Bremseth this controversy would not have arisen, but the respondent contends, and the trial court held, that because the legal title of the premises was in the wife, she not being the head of the family, such homestead could not be claimed as exempt either by the wife or by the husband. This contention is clearly erroneous, and must be overruled. The real property was the homestead of the appellants and their family, and the fact that the legal title was in the wife does not deprive the husband, as the head of the family, from asserting his homestead exemption. The real property in question was as much the homestead of the husband as though he held the legal title, and it is clear to our minds that even if the wife, by reason of the fact that she was not the head of the family, could not claim said property as exempt, which we do not determine, the appellant Ole L. Bremseth could do so. The courts of a few states have held to the contrary, as we will hereafter notice, but the great weight of authority, as well as reason, are opposed to respondent's contention. It is firmly settled that the homestead exemption law is remedial in character, and should be liberally construed with a view of effecting its objects, and in our opinion it is a wholly unwarranted construction of our Constitution and statutes relating to the homestead exemption to hold that neither the hus-

band nor the wife can claim the property as exempt under the facts in this case. Section 208 of our Constitution provides: "The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws, exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law." Pursuant to this constitutional mandate, the legislative assembly enacted a law providing that the homestead of every head of a family shall be absolutely exempt "from levy and sale upon execution and from any other final process issued from any court." Section 5049, Rev. Codes 1905. It is too plain for discussion that the object sought by the adoption of this constitutional provision, and by the enactment of this and similar statutes in other states, was to protect and preserve the home, not for the benefit of the head of the family, but for the benefit of the family as a whole. If such was not the intention, then why did the legislature restrict the operation of the exemption law to heads of families? Why was it not extended to all debtors? The answer is apparent. It was the protection of the family which was the purpose in view, and, this being true, it is the duty of the courts, in construing said provisions, to give effect to such plain intent. The fact that the legal title to this property was in the name of Mrs. Bremseth did not make it any the less the homestead of Mr. Bremseth, who was the head of the family. Respondent's contention to the effect that the head of a family cannot claim such homestead exemption unless he has the legal title is clearly unsound. It is wholly immaterial in whom the legal title is vested, provided it is the home of the family. It cannot possibly concern the creditor whether the title is in the husband or the wife. The statute (section 5050, Rev. Codes 1905) provides: "If the homestead claimant is married, the homestead may be selected from the separate property of the husband, or, with the consent of the wife, from her separate property." The construction contended for by respondent's counsel would completely nullify this statute, or greatly restrict the operation of its beneficent provisions. It must be conceded that under the express language of our Code, Mrs. Bremseth can neither alienate nor in any manner incumber this property, so long as it remains impressed with its homestead character, unless her husband joins with her in the execution of such conveyance, or in the execution of the instrument by which such incumbrance is created; yet the effect

of respondent's contention is that the wife, by contracting ordinary indebtedness, may enable her creditors, through judgment and execution, to just as effectually divest the family of such homestead as though she was given the right to do so directly by conveyance or mortgage. Such contention must be overruled. The opinion in *Ness v. Jones*, 10 N. D. 587, 88 N. W. 706, 88 Am. St. Rep. 755, relied upon by respondent's counsel, in no way sustains such contention. The question decided in that case was that the wife, not being the head of the family, could not claim her separate personal property as exempt. No such question as the one here involved was under consideration in that case, and hence the language there used can have no application to the proposition under consideration in the case at bar.

The few cases holding to the rule asserted by respondent are *Davis v. Dodds*, 20 Ohio St. 473; *Turner v. Argo*, 14 S. W. 930, 89 S. W. 443; *McGinnis v. Wood*, 47 Pac. 492, 4 Okl. 499; *Producers' Nat. Bank v. Cumberland Lumber Co.*, 45 S. W. 981, 100 S. W. 389; *Bennett v. Georgia Trust Co.*, 32 S. E. 625, 106 Ga. 578. Respondent also cites, as sustaining his contention, *Barry v. Western Assurance Co.*, 49 Pac. 148, 19 Mont. 571, 61 Am. St. Rep. 530, but this case holds squarely to the contrary. The action was brought by the wife to recover under an insurance policy upon the dwelling house situated upon the homestead of the family, the title to which was in her. The money had been attached in the hands of the insurance company at the suit of her creditors and she sought to claim the same as exempt, but the court held against her contention for the reason that she was not the head of the family, but the court said: "It is clear to us that, if the property had been seized for a debt of Mr. Barry, he could have claimed its exemption as a homestead. It was the residence of his wife and children, and his home." The case of *Davis v. Dodds*, *supra*, was disposed of by a mere statement contained in one sentence, and the case of *Turner v. Argo*, *supra*, contains but a brief statement; no reason for the rule being given in the opinion in either case. *Bennett v. Georgia Trust Co.*, *supra*, was decided under a statute which provided that "the property of every debtor who is the head of a family shall be exempt," etc. That case would be in point if our Constitution and Code had provided simply that the property of every debtor who is the head of a family should be exempt, instead of providing as it does. *McGinnis v. Wood* and

Producers' Nat. Bank v. Cumberland Lumber Co., *supra*, seem to hold squarely in favor of respondent's theory as to the proper construction of these statutory enactments, but they are, in our opinion, clearly unsound on principle, as well as opposed to the overwhelming weight of authority. As sustaining our views, see *Stout v. Rapp*, 17 Neb. 462, 23 N. W. 364; *Crane v. Waggoner*, 33 Ind. 83; *Kendall v. Powers*, 96 Mo. 142, 8 S. W. 793, 9 Am. St. Rep. 326; *Powers v. Sample*, 12 South, 337, 59 Miss. 67; *Orr v. Shraft*, 22 Mich. 260; *Henderson v. Rainbow*, 76 Iowa, 320, 41 N. W. 29; *Partee v. Stewart*, 50 Miss. 721; *Lowell v. Shannon*, 60 Iowa, 713, 15 N. W. 566; *McPhee v. O'Rourke*, 10 Colo. 301, 15 Pac. 420, 3 Am. St. Rep. 579; *Folsom v. Folsom*, 68 N. H. 310, 34 Atl. 743; *Herring v. Johnston*, 72 S. W. 793, 24 Ky. Law Rep. 1940; *Hill v. Myers*, 46 Ohio St. 183, 19 N. E. 593; *Monroe v. May, Well & Co.*, 9 Kan. 476; *Cipperly v. Rhodes*, 53 Ill. 346; *Dreutzer v. Bell*, 11 Wis. 114; *Waples on Homesteads and Exemptions*, 65; *Thompson on Homesteads and Exemptions*, 187. The Supreme Court of Missouri in construing a statute very similar to our own in *Kendall v. Powers*, *supra*, said: "The law exempts from execution and attachment the homestead of every housekeeper or head of a family. The husband as the head of a family may have a homestead in a life estate, or in property, the title to which is in his wife. *Thompson on H. & Ex.* 220. * * * Whether the debtor owns the fee, has but a marital interest in the property, or a life estate is a matter of no concern to the creditors; the debtor being the head of a family and the property his homestead. Be the interest what it may, it is exempted from sale under execution." This opinion commends itself to our judgment as a very sound and clear statement of the law upon this question, and we have no hesitancy in reaching the same conclusion therein announced. The other cases we believe to be equally in point.

We therefore decide that the trial court erred in making the order appealed from; and the same is therefore reversed, with costs to appellants. All concur.

(112 N. W. 1056.)

ANDREW LARSON V. R. A. CALDER.

Opinion filed Sept. 4, 1907.

Sale of Horses — Warranty — Question for Jury.

1. Respondent purchased two horses of appellant, who represented a discharge from their nostrils as being caused by a cold caught in swimming the Missouri, and stated that they were sound, and would be all right in a day or two, in answer to respondent's inquiry as to the cause of the discharge. *Held*, that if there was doubt as to this representation being a warranty, it was a proper question for submission to the jury.

Same — Breach of Warranty — Glanders.

2. Conviction, under section 9077, Rev. Codes 1905, is not a necessary prerequisite to the maintenance of an action for damages for breach of warranty of horses against the disease known as "glanders."

Trial — Where Both Parties Move for Directed Verdict, Submission to Jury is Waived.

3. Both parties made motions for a directed verdict after all the evidence was submitted. The court overruled one motion and granted the other. The parties by such motions waive their right to submit questions of fact to the jury, and submit all such questions to the court for its decision, and neither party can complain on motion for new trial or appeal that the question of warranty was not submitted to the jury.

Same — Review.

4. In such cases the action of the trial court will be sustained, unless there is an absence of any facts in the evidence on which to base it.

Breach of Warranty — Measure of Damages — Care of Infected Animal by Purchaser.

5. In addition to the excess of the value which the property sold would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time, the plaintiff may recover for a breach of warranty on the sale of horses warranted against an infectious disease, cost of medicine, feed, and attendance, between the time of sale and the date when the state veterinarian killed such animals because of such infection.

Same — Knowledge of Vendor.

6. It is not necessary to allege or prove in an action for a breach of warranty against an infectious disease that the vendor had knowledge of the infection at the time of the sale.

Action by Andrew Larson against Ira Calder. Judgment for plaintiff, and defendant appeals.

Affirmed.

Burke & Middaugh, for appellant.

Defendant should have been convicted criminally under the statute before recovery could be had in a civil action. Rev. Codes 1905, section 9077. *Newell v. Clapp*, 72 N. W. 366.

In the absence of a warranty defendant's knowledge of the existence of the disease should be alleged and proved. *Bradford v. Floyd*, 80 Mo. 207; *Coyle v. Conway*, 35 Mo. 490; *Pattee v. Adams*, 37 Kan. 133; *St. Louis R. R. Co. v. Goldsby*, 58 Ark. 101.

Affirmation made at the time of the sale of an article, as to its quality or condition, will be treated as a warranty if so intended, and the purchaser bought on the faith of it; the intention and the effect on the purchaser are questions for the jury. 1 *Smith, Lead-Cas. Hare & Wallace's Notes*, 229 (7th Ed.) 300, 337; *Benj. on Sales*, 499; 1 *Parsons, Cont.* 459; *Hughes v. Funston*, 24 Iowa, 287; *McGrew v. Forysthe*, 31 Iowa, 179; *McDonald Mfg. Co. v. Thomas*, 5 N. W. 737; *Tewkesbury v. Bennett*, 31 Iowa, 83; *Bowen v. Shippen*, 30 L. Ed. (U. S.) 1172; *Osgood v. Lewis*, 2 *Harr. & G.* 495; *Oneida, etc., Soc. v. Lawrence*, 4 *Cow.* 440; *Cook v. Mosely*, 13 *Wend.* 278; *Chapman v. Murch*, 19 *Johns.* 290; *Hawkins v. Berry*, 5 *Gil.* 36; *McGregor v. Penn*, 9 *Yerg.* 76; *Otto v. Alderson*, 10 *Smedes & M.* 476; 5 *Wait. Act. & Def.* 555; *Horton v. Green*, 66 N. C. 596; *Polhemus v. Heimar*, 45 *Cal.* 573; *Bank of Spearfish v. Graham*, 91 N. W. 340; *Humphreys v. Comline*, 8 *Blackf.* 516; *McFarland v. Newman*, 9 *Watts*, 55; *Foster v. Caldwell's Estate*, 18 *Vt.* 176; *Bond v. Clark*, 35 *Vt.* 577; *Bradford v. Bush*, 10 *Ala.* 386; *Thorne v. McVeagh*, 75 *Ill.* 81; *Dake Engine Mfg. Co. v. Hurley*, 57 N. W. 1044; *Scott v. Raymond*, 18 N. W. 274; *Halliday v. Briggs*, 18 N. W. 55; *Titus v. Poole*, 40 N. E. 228; *Smith v. Justice*, 13 *Wis.* 600; *Congar v. Chamberlain*, 14 *Wis.* 258; *Boothby v. Scales*, 27 *Wis.* 626.

Anderson & Traynor, for respondent.

This action does not depend upon a previous conviction in a criminal proceeding. *Conrad v. Crowdsen*, 75 *Ill.* 246, 2 *Cyc.* p. 336.

Plaintiff is entitled to recompense for feed, care and treatment of diseased horses. 1 *Suth. on Dam.* 148; *Long v. Clapp*, 19 N. W. 467.

By motion for directed verdict errors as to admission of evidence are waived. *Battis v. McCord*, 30 N. W. 11.

Where a warranty is given, knowledge on the part of the warrantor of a defect constituting a breach is unnecessary. *Joy v. Bitzer*, 41 N. W. 575; *Stevens v. Bradley*, 56 N. W. 428; *Murphy v. McGraw*, 41 N. W. 917, 30 *Am. & Eng. Enc. Law*, 1318 (Note 5.)

After motion for a directed verdict is overruled, the mover must specifically request the submission of questions of fact that he desires the jury to determine. *Stanford v. McGill*, 6 N. D. 536, 72 N. W. 938; *Mayer v. Dean*, 22 N. E. 261; *Sutter v. Vanderveer*, 25 N. E. 907; *Provost v. McEncroe*, 5 N. E. 795; *Battis v. McCord*, *supra*; 6 *Enc. Pl. & Pr.* 693, 702, 703; 2 *Thompson on Trials*, 272; *Winchell v. Hicks*, 18 N. Y. 558; *Colligan v. Scott*, 58 N. Y. 670; *Merwin v. Magone*, 17 C. C. A. 361, 70 *Fed.* 776; *Beutell v. Magone*, 157 U. S. 154, 15 *Sup. Ct.* 566; *Chrystie v. Foster*, 9 C. C. A. 606, 61 *Fed.* 551.

Damages for caring for infected animals are recoverable. 3 *Suth. on Damages*, 671, 675; *Love v. Ross*, 56 N. W. 528; *Joy v. Bitzer*, *supra*; *Long v. Clapp*, *supra*; *Murphy v. McGraw*, 41 N. W. 917; *McCann v. Ullman*, 85 N. W. 493; *Short v. Matteson*, 47 N. W. 874.

All material representations as to the character and condition of an animal, made by the seller in the course of the sale, are warranties, unless it affirmatively appears that they were not so intended nor so understood. 30 *Am. & Eng. Enc. Law*, 155; *Murphy v. McGraw*, 41 N. W. 917; *Stevens v. Bradley*, 56 N. W. 428.

SPALDING, J. This is an action for damages for breach of warranty of soundness on the sale of two horses by the defendant to the plaintiff. The complaint charges that the defendant agreed and warranted to the plaintiff that the horses were in every way sound and in good health, and thereby induced the plaintiff to purchase the same and to pay the price of \$240 therefor; whereas at the time of the sale and warranty such horses were not sound, and not in good health, but were suffering from glanders, and as a result were shot by the state veterinarian. The plaintiff asked judgment for the price paid for the horses and

for \$6 paid for medicine in treating them, and for \$80 for feed and services in caring for them. The defendant denied the warranty, and also denied that the horses were unsound or unhealthy or suffering from glanders, and the expenditure of the amount claimed for feed, medicine and services. On the trial of the case it was shown without evidence to the contrary that the respondent purchased the team for \$240 on the 2d day of July, 1902, and that at the time of purchase he noticed that they were running at the nose, and made inquiry of the appellant as to the cause, and was told by him that he had recently brought them from Montana, and in so doing had swum them across the Missouri river, when they took cold, and that they were sound, and would be all right in a day or two. Respondent testified that he believed this statement of appellant, and took the horses home. About fifteen days after he bought them, he drove them to Devils Lake, and Dr. Crewe, the state veterinarian, noticing the condition of the horses while in Devils Lake, told the respondent who he was, and made an examination, and ordered him to keep the horses separate from other horses, which he did, and thereafter followed the instruction of Dr. Crewe. The veterinarian went to see the team on the 21st day of July, when they appeared better, but he decided to treat them until satisfied they were free from glanders, and continued the quarantine. He saw them from time to time thereafter, and found them still suffering, but did not make a final test for glanders until about May 13, 1903, when it was demonstrated that they were affected with glanders. and he afterward killed them. He also testified that in his opinion they were affected with glanders when bought on the 2d day of July, 1902, and that the period of infection from the time that horses are inoculated with glanders until they will show a discharge from the nose and before clinical symptoms are developed is from thirty days upwards; thirty days being the usual minimum. He would have condemned them in July, 1902, if he had been absolutely sure that they had the glanders, but the next time he saw them he thought they were better. A horse will get better at times when suffering with glanders. The plaintiff was allowed to prove, over objection, the value of the feed for the horses and services in caring for them between the time they were quarantined and the time they were killed, and such proof disclosed this value at some \$50 more than was demanded in the com-

plaint or than judgment was entered for. The evidence submitted by the plaintiff was not contradicted. The defendant sought to show that he had not been arrested for bringing glandered horses into the state. The court sustained the objections of the plaintiff to evidence on this subject. After both parties rested the defendant moved the court to instruct the jury to find a verdict for him, on the ground and for the reason that the evidence on the part of the plaintiff showed no warranty of the horses, and because there was no proof that, if the horses did have an infectious disease at the time of the sale, the defendant knew that they were so infected, and for the further reason that the plaintiff claimed the right to recover on the theory that the horses were glandered when there was no evidence in the case that the defendant was ever arrested and convicted of selling horses infected with the disease commonly known as "glanders." The court overruled the motion, and defendant excepted, whereupon the plaintiff moved the court to instruct the jury to return a verdict in his favor for the amount asked for in the complaint. This motion was granted, and an exception allowed. Under the instruction of the court, the jury returned a verdict in favor of the plaintiff and against the defendant for \$326, with interest at 7 per cent since July 3, 1902. A motion for a new trial was submitted and denied, and judgment entered upon the verdict, and this appeal perfected.

The appellant's first contention is that his motion for a directed verdict should have been granted because plaintiff's right to recover was based on a criminal statute, and he could not recover without showing that the defendant had been convicted of the criminal offense of selling animals affected with a contagious or infectious disease. He cites *Newell v. Clapp*, 97 Wis. 104, 72 N. W. 366, as authority. The statute of Wisconsin on which the decision in that case was predicated differs materially from ours. The Wisconsin law provides that any person convicted of any of the above acts or omissions shall be fined, and be liable to all persons injured, for damages by them sustained. Section 9077, Rev. Codes N. D. 1905, provides that every person violating any of the provisions of this chapter (making it a misdemeanor to sell, etc., any horse, mule or ass, knowing, or having reason to believe, it to be infected with glanders) shall be liable to any one in a civil action injured by such violation for all damages directly or indirectly occasioned thereby. It will be seen that the fact of

conviction is, under the Wisconsin statute, a condition precedent to the right to recover for its violation, while under the statute of this state no such condition is expressed and none can be implied. But this difference is immaterial, as plaintiff did not ground his right to damages on this statute, and his complaint is not framed on the theory of its having been violated by the defendant. The action is clearly for breach of warranty, as will be seen from the quotations from the complaint in the first part of the opinion. The pleading made two issues on that point—the fact of the warranty and the fact of the unsoundness.

The questions presented are: (1) Was the statement that the horses were only suffering from a cold caught in swimming the Missouri, and that they were sound, and would be all right in a day or two, a warranty? (2) If a warranty is involved, should the question as to the statement amounting to a warranty have been submitted to the jury, notwithstanding both parties had asked for a directed verdict? (3) If the statement was a warranty, was it necessary to allege in the complaint that defendant knew the animals had the glanders? (4) If the horses were warranted against glanders, and were infected with the disease at the time of the sale, is plaintiff entitled to recover for their feed, medicine, and care between that date and the day when they were killed by the state veterinarian?

A number of cases are found holding that statements similar to the one made by appellant to respondent when these horses were sold are warranties as a matter of law. The distinction drawn between those which are and those which are not warranties depends upon whether the representation was affirmed as a fact as to material qualities, and was acted upon by the purchaser, or whether it was a mere expression of opinion. In the former case it is held to be a warranty, while in the latter the contrary is usually held. *Henshaw v. Robins*, 50 Mass. 83, 43 Am. Dec. 367; *Bank of Spearfish v. Graham*, 16 S. D. 49, 91 N. W. 340. Where, however, there is a doubt whether the language used was intended as a warranty or received by the purchaser as such, the question of warranty must be submitted to the jury. A use of the word "warrant" is not necessary, but any language constituting a representation equivalent to a warranty answers the same purpose, and has the same legal effect, although in some cases it may be in the form of an opinion. The interpretation of the language used, the intention of

the vendor, and the question as to whether the purchaser relied upon the statement, may be determined by their relation to all the proven circumstances of the case. 30 Am. & Eng. Enc. Law, pp. 136, 137, notes 1, 5; Id. p. 151; McGrew v. Forsythe, 31 Iowa, 179; McDonald Mfg. Co. v. Thomas, 53 Iowa, 558, 5 N. W. 757; Foster v. Estate of Caldwell, 18 Vt. 176; Bond et al. v. Clark, 35 Vt. 577; Boothby et al. v. Scales, 27 Wis. 626; Clark v. Rice, 127 Wis. 451, 106 N. W. 231. If the expression used by appellant on the sale of the horses to respondent did not constitute such a warranty as would have justified the court in taking that question from the jury, on the other hand, the court would not have been justified in directing a verdict for the defendant on the theory that it was not a warranty. If the meaning was doubtful, it was a question for the jury.

The next question is whether the court erred in directing a verdict after both parties had rested, and both appellant and respondent had made motions for a directed verdict. It is well established that in such cases both parties waive any right to a submission of the case to the jury, and that the findings of the court are thereby substituted for the verdict of the jury, that all questions which could properly have been submitted to the jury are thereby submitted to the court for its decision. Therefore it will be seen that appellant has no ground for complaint, because the question as to the statement on the sale being a warranty was not submitted to the jury. The court took the place of the jury, and was entitled to take into consideration all the facts and circumstances surrounding the sale precisely the same as it would have been the duty of the jury to do, and there is no evidence that the court did not do so. The court having acted upon the motions of both parties, and having directed a verdict for the respondent, appellant cannot now say that the court erred in its decision, unless there was an absence of any facts on which to base it. There is ample authority for its finding that the statement made was a warranty. Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760, and cases cited; 6 Enc. Pl. & Pr. 703.

The plaintiff set out in his complaint items of expenditure for medicine, care and feed for the horses between the time he purchased them and the day of their being killed by the veterinarian as special damages amounting to \$86. It is urged that no allowance should be made for these expenditures as special damages.

Superficially, the measure of damages for a breach of warranty of the quality of personal property sold, as stated in section 6575, Rev. Codes 1905, would seem to preclude the recovery of expenses for medicine, etc.; but, on careful examination of the cases analogous to the case at bar, we find it almost uniformly held that the purchaser is entitled to recover these expenditures. In this case the veterinarian was not certain when he first inspected the horses that they were affected with glanders, but he immediately took the necessary and proper precautions to prevent the spread of the disease in case they should prove to be infected. He visited them from time to time, and watched the progress of the disease carefully until he became certain of the nature of their ailment, and then killed them. These were not the acts of the respondent, but were the acts of a state official whose duty is fixed by law. Had he killed them in the first instance, some one, either the plaintiff or the defendant, would have incurred a loss. By caring for them, the nature of the disease was determined, and, had it not proved to be glanders or anything covered by the warranty, the cost of care, feed and medicine would have fallen on the respondent. It was therefore, in the interest of the appellant and for his benefit, that they were cared for until the suspicion of the veterinarian ripened into a certainty. With the disease the horses were worthless, and liable to spread it among the other horses owned by respondent, as well as throughout the community, and the fact that the purchaser took such care of them was greatly to the advantage of the appellant, and we have concluded the respondent should recover these expenditures as special damages, in addition to the value of the horses. Sutherland on Damages (3d Ed.) sections 670, 671, 675; Cary v. Gruman, 4 Hill (N. Y.) 625, 40 Am. Dec. 304, cases cited in note; Long et al. v. Clapp et al., 15 Neb. 417, 19 N. W. 467; Perrine v. Serrell, 30 N. J. Law, 454; Mitchell v. Pinckney, 127 Iowa, 696, 104 N. W. 286; Love v. Ross, 89 Iowa, 400, 56 N. W. 528; Joy v. Bitzer, 77 Iowa, 73, 41 N. W. 575, 3 L. R. A. 184; Murphy v. McGraw, 74 Mich. 318, 41 N. W. 917; Pinney v. Andrus, 41 Vt. 631.

The only remaining question relates to the failure of the plaintiff to allege in his complaint or to prove that defendant knew the animals were infected with glanders. That such knowledge is not necessary to support an action for breach of warranty is elementary, and the cases are uniform in so holding. A gradual change

in the construction of statements and representations made on the sale of personal property seems to have taken place, and the courts are now much more liberal in their construction of such representations than formerly. The modern tendency seems more strongly in favor of the purchaser. This is peculiarly so on the sale of horses, where the courts seems to incline toward holding almost any representation made at the time of sale a warranty. When the language used will bear such a construction, it will be fairly inferred that the purchaser understood it as a warranty. 30 Am. & Eng. Enc. Law, p. 138, note 3; also pages 155, 156, notes 1, 4. We have not deemed it necessary to determine whether the representation made by the appellant was in law a warranty; but hold that there was evidence which justified the trial court acting as a trier of fact and taking into consideration all the circumstances in finding it a warranty in this case. *Stevens v. Bradley*, 89 Iowa, 174, 56 N. W. 429; *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595; *Hobart v. Young*, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693.

The judgment of the trial court is affirmed, with costs to respondent. All concur.

(113 N. W. 103.)

MORRISON MANUFACTURING COMPANY V. FARGO STORAGE AND
TRANSFER COMPANY.

Opinion filed Aug. 3, 1907. Rehearing denied Oct. 26, 1907.

Sale — Construction of Contract — Bailment — Parol Evidence.

1. The contract set forth in the opinion construed, and *held* to be an agreement of sale of the property therein mentioned, and not a bailment as contended for by appellant. *Held*, further, that even if such contract, by reason of ambiguity, could be held subject to explanation by parol, or by the subsequent conduct of the parties, such proof is insufficient to sustain appellant's contention that the same was intended merely as a storage and transfer contract.

Interest — Sale of Goods — Necessity of Demand.

2. By the terms of the contract, appellant obligated itself to pay to respondent the purchase price of the property on or before December 1, 1900. The indebtedness falling due on said date, respondent was entitled to recover interest thereon from such time, at the legal rate, even though no demand for payment of such indebtedness was made prior to the commencement of the action.

Action by the Morrison Manufacturing Company v. the Fargo Storage and Transfer Company. Judgment for plaintiff and defendant appeals.

Affirmed.

W. E. Dodge, for appellant.

If the condition is precedent no title passes until it is performed, after that sale is absolute. 21 Am. & Eng. Enc. Law, 628; Rowan v. Union Arms Co., 36 Vt. 124; Vasser v. Buxton, 86 N. C. 335; Forrest v. Nelson, 108 Pa. St. 401.

An agreement may be considered in the light of surrounding circumstances. In re Sheldon's Estate, 97 N. W. 524; Stewart v. Pierce, 89 N. W. 234.

That sense, in which one party to a contract supposed the other understood it, will prevail. Rouss v. Creglow, 72 N. W. 429; Pratt v. Prouty, 73 N. W. 1035; Lull v. Anamosa Nat'l. Bank, 81 N. W. 784.

The construction placed upon a contract by the parties thereto will be adopted. Williams v. Autens et al., 93 N. W. 943; Rice v. McCague, 86 N. W. 846; McGavock v. Omaha Nat. Bank, 90 N. W. 230; Hart v. Hart, 94 N. W. 890; Hudson v. Columbian Transfer Co., 100 N. W. 402.

V. R. Lovell, for respondent.

A contract that provides for resales by vendee and the ownership of proceeds or evidence of sale, is one of conditional sale. In re Tweed, 131 Fed. 355; Standard Implement Co. v. Parlin, 33 Pac. 360; South Bend & Co. v. Cottrell, 31 Fed. 254; Hirsch v. Steele, 36 Pac. 49; Boon v. Moss, 70 N. Y. 465; F. J. Dewes Brewing Co. v. Merritt, 9 L. R. A. 270; Rogers v. Whitehouse, 71 Me. 222; Wright v. Bernard, 56 N. W. 424; Wheeler v. New Haven Wire Co., 16 Atl. 393; Mack v. Story, 18 Atl. 708; McGinnis v. Savage, 1 S. E. 746.

If a contract is ambiguous, and the evidence conflicting, the construction put upon it by the parties themselves, is one of fact for the jury. 6 Enc. of Law (2d Ed.) 439; Slayton v. Horsey, 91 S. W. 799; Richey v. Burnes, 83 Mo. 362; Sawyer v. Spafford, 58 Mass. 598; Kraemer v. Sieberg, 2 N. Y. Supp. 393; Claflin v. Elliott, 34 Atl. 259.

Where both parties move for a directed verdict, the decision will not be disturbed where there is evidence to sustain it. *New England Mortgage Co. v. Great Western Elevator Co.*, 6 N. D. 407, 71 N. W. 130; *Stanford v. McGill*, 6 N. D. 536, 72 N. W. 938; *First M. E. Church v. Fadden*, 8 N. D. 162, 77 N. W. 615; *Church v. Foley*, 71 N. W. 759; *Angier v. Western Assurance Co.*, 71 N. W. 761.

Under a conditional sale contract, on default in the terms of payment, the vendor may recover the property or sue for the purchase price. 6 Am. & Eng. Enc. Law, 480; *Kilmer v. Moneyweight*, 76 N. E. 271; *National v. Hill*, 48 S. E. 637; *Davis v. Millings*, 37 So. 737; *National v. Dehn*, 102 N. W. 965; *McRea v. Merrifield*, 48 Ark. 160; *Loomis v. Bragg*, 47 Am. Rep. 638.

FISK, J. This appeal calls in question the correctness of the rulings of the district court of Cass county in denying the defendant's motion for a directed verdict and in directing a verdict in plaintiff's favor, the real controversy involving the construction to be given to the following contract entered into between the parties, being plaintiff's exhibit A:

"Conditions Upon Which We Accept This Order.

"That no claim for defective shares or shovels will be made or allowed after same have been in a blacksmith forge. We take a clear receipt for all the goods we ship. If anything is lost or broken, the carrier is to be held responsible, and not us. No goods are to be returned except on our order. All orders are understood to be for right hand plows unless expressly stated otherwise. Repairing done elsewhere than at the factory will not be paid for by us. We reserve the right to withhold shipments of goods to parties whose standing we have reason to question, or for other reasons satisfactory to us. No orders to be countermanded except on payment to Morrison Manufacturing Company of 20 per cent of net amount of same as liquidated damages. No damage to be claimed by purchaser if Morrison Manufacturing Company are unable to fill this order and their notice to that effect will release purchaser and give him the right to place order elsewhere. Breakage caused by defects will be made good by new parts, which will be charged for when sent, and a corresponding credit will be made only upon return of defective parts to the factory by freight. No

agreements, conditions, or stipulations, verbal or otherwise, save those mentioned in this contract, will be recognized. It is expressly agreed and understood that the title to the goods ordered herein and all other goods ordered this season shall remain in the Morrison Manufacturing Company until they have been paid for in full; and said Morrison Manufacturing Company have the right to take possession of the goods and any notes that may have been given in exchange for them, if at any time they feel themselves insecure.

"Morrison Manufacturing Company."

"Warranty Under Which We Accept This Order.

"Any goods reported as defective or not doing good work are not to be returned without orders. The right is reserved to send a man to examine, and, if necessary, to test the goods, and, if they work properly, the dealer to pay all expenses of the trip and test. If they are defective, either in material or mechanism, the manufacturer is to pay all expenses. In no case will we repair, without charge, or exchange any goods or parts thereof, that have been in use three days. Goods warranted only against breakage caused by manifest defects in material, and no returned goods will be credited on account; but defective goods will be made good and returned, or new goods sent instead, at our option.

"Morrison Manufacturing Company."

"Oct. 27, 1899.

"Morrison Manufacturing Company, Ft. Madison, Iowa—Please enter our order for the goods herein selected, delivering same on board cars at Minneapolis, Fargo Storage & Transfer Co., Fargo, N. Dak. Ship via N. P. R. R. in month of * * * at once, or within a reasonable time thereafter. We agree to forward you our notes for same within five days after receipt of goods, at prices and terms as noted herein, which are hereby made a part of this contract, for this and additional orders, during the fall season of 1899. Highest legal interest after maturity and 10 per cent fees if collected by attorneys. All extras and repairs net 30 days F. O. B. factory, unless expressly stipulated otherwise. Twenty-five per cent off list published in current repair catalogue. We thoroughly understand that cash discounts are not to be allowed excepting on the dates marked on the several pages of this contract, and that any payments made after those dates, anticipating maturity, may

be discounted at the rate of 7 per cent per annum. We desire the control of your plows and cultivators in territory described on filing page, during the season as noted above, and agree to handle no other make. We agree that this contract shall be subject to the conditions and warranty printed on opposite page. No claim will be made for goods damaged in shipment when same are receipted for in good order, or for shortage after five days from receipt of goods, or for breakage in hardened shares or shovels. It is agreed and understood that we will accept goods on arrival, pay all the freight and charges thereon, and, in case freight is agreed to be allowed, either in whole or in part, the original paid railroad expense bills shall be forwarded to Morrison Mfg. Co., and proper amount deducted from account at settlement, without interest and without claim for cash discount. No allowance to be made for express upon repairs and extras. We will look to transportation companies for all losses occasioned by damage to or failure to deliver any goods shipped when receipted for in good order. We will remit with exchange on New York or Chicago, or by express, charges prepaid, but in no case with our personal check. We hereby expressly agree that the title to and ownership of the within named goods, or that may be shipped as herein provided, shall remain, and the full proceeds in case of sale, shall be the property of the Morrison Manufacturing Company, but nothing in this clause shall release us from making the payments as herein stated. We further agree that all notes under this contract are to be taken as evidence and as an acknowledgment of the debt only and not as payment for the goods. The copy of this contract held by the Morrison Manufacturing Co. is to be considered the original and to be the binding agreement in case the duplicate varies from it in any particular. We acknowledge having received a duplicate of this contract and order.

"[Sign Here.]

Fargo Storage & Transfer Co.,

"By M. F. Williams, Pr.

"Accepted subject to approval of home office of Morrison Manufacturing Co.

"P. J. Downes, Salesman.

“Morrison Riding Plows.

“Terms: ——— per cent. discount or net prices as indicated. Note due December 1st, 1899, subject to a cash discount of 10 per cent. if paid September 1st, 1899, or 15 days from date of shipment and per memorandum.

“Gang Plows.

Right Hand.	Net Price.	Fac’y Price.
Twenty 24-in. with two 12-in. Stubble.		
Bottoms 4-in. Beams 775 lbs.	\$58.00	\$85.00
40—14-in. Shares Free.		

“Memorandum.

“Goods herein ordered unsold this season shall be due and payable same terms in 1900.”

In making this agreement a printed form was used, and most of its provisions are the usual printed provisions contained in blanks furnished for the purpose by respondent. The action was commenced and the complaint framed upon the theory that said contract constituted a sale of the machinery therein mentioned by plaintiff to defendant, while defendant’s assignments of error are predicated upon the theory that such contract was a bailment, or, in other words, that by the terms of said contract plaintiff delivered said property to defendant for storage and transfer merely, and that plaintiff never parted with the title thereto either absolutely or conditionally. Appellant’s contention is based upon certain language found in the contract, and also upon the subsequent conduct of the parties, as well as upon certain correspondence had between them, from which it is argued that the plain intent of the parties was to treat the same as a contract of storage and transfer, and not an absolute or conditional sale. Appellant concedes that, if such contract was one of purchase and sale, absolute or conditional, the verdict was correct, except as to the allowance of certain interest.

We have carefully examined this instrument, and have reached the same conclusion as that arrived at by the trial court. There is nothing upon the face of the contract which would warrant a court in construing it otherwise than as a sale. The stipulations reserving the title in the vendor until a sale or until paid for by the vendee, and providing that the proceeds of such sale shall be and remain the property of the plaintiff until accounted for, are the usual security clauses frequently inserted in sale contracts, and

are, we think, entirely consistent with the theory of a conditional sale. As we construe the contract, there are none of its provisions which are not entirely consistent with the theory of a sale; while, on the other hand, many of its provisions are wholly inconsistent with the theory of a contract merely for storage and transfer, a few of which stand out prominently in the instrument. For instance, among other stipulations, are the following: We desire the control of your plows and cultivators during the season as noted above, and agree to handle no other make." "We agree to forward you our notes for same within five days after receipt of goods at prices and terms as noted herein, which are hereby made a part of this contract for this and additional orders during fall season of 1899." "We will look to transportation companies for all losses occasioned by damage or failure to deliver any goods shipped when receipted for in good order." "Warranty under which we accept this order. Goods warranted only against breakage caused by manifest defects in material, and no returned goods will be credited on account; but defective goods will be made good and returned or new goods sent instead, at our option." "Nothing in this clause shall release us from making the payments as herein stated." "If anything is lost or broken, the carrier is to be held responsible and not us." "It is expressly agreed and understood that title to the goods ordered herein and all other goods ordered this season shall remain in the Morrison Manufacturing Company until they have been paid for in full." "This contract shall be subject to the conditions and warranty printed on opposite page." If the parties had intended a bailment, instead of a sale of the property, why were these provisions inserted? They are all foreign to and inconsistent with the idea of a contract of bailment. If appellant was to act as a mere bailee of the property for the purpose of storing and transferring the same for respondent, it is inconceivable that it would have agreed to give its promissory notes for the plows, or that respondent would have expressly reserved the title, or that appellant would have agreed to look to transportation companies for any loss or damage in shipments, or that respondent would have warranted the plows to appellant. From a reading of the whole instrument, we are forced to the conclusion that the contract was clearly intended to be a sale as distinguished from a bailment, and that the provision reserving title in the vendor was intended merely as a security for the

payment of the purchase price. The courts of this country with great unanimity have held contracts similar to the one in question to be contracts of conditional sale. *Smith v. Williams*, 90 App. Div. (N. Y.) 507, 85 N. Y. Supp. 506; *In re Tweed* (D. C.) 131 Fed. 355; *Standard Implement Co. v. Parlin*, 51 Kan. 544, 33 Pac. 360; *Cleveland, etc., Co. v. Matson*, 30 Ill. App. 372; *South Bend, etc., Co. v. Cottrell* (C. C.) 31 Fed. 254; *Hirsch v. Steele*, 10 Utah, 18, 36 Pac. 49; *Lewis v. McCabe*, 49 Conn. 140, 44 Am. Rep. 217; *Boon v. Moss*, 70 N. Y. 465; *Bryant v. Crosby*, 36 Me. 562, 58 Am. Dec. 767; *Rogers v. Whitehouse*, 71 Me. 222; *Wright v. Barnard*, 89 Iowa, 166, 56 N. W. 424; *Wheeler v. New Haven Wire Co.* (Conn.) 16 Atl. 393; *Mack v. Story*, 57 Conn. 407, 18 Atl. 707; *McGinnis v. Savage*, 29 W. Va. 362, 1 S. E. 746; *Frank v. Batten*, 49 Hun. (N. Y.) 91, 1 N. Y. Supp. 705.

Appellant's counsel makes a very plausible argument in support of his contention that, if the contract should be held to be ambiguous, the subsequent conduct of the parties demonstrates beyond question that they considered it a mere storage and transfer contract, and that such intention should control. While we consider that the contract is clear and unambiguous, and hence that parol evidence is incompetent to show that the parties intended to enter into a contract different from that disclosed by the instrument, we will briefly note the evidence introduced at the trial, in so far as it tends to throw light upon such intent. Certain correspondence was had between the parties after the contract was entered into, as follows: On June 28, 1900, appellant wrote respondent as follows. "We are in receipt of your favor of the 26th, and in reply will say that the situation up here is very serious. If this country gets back its seed and flour, it will do very well. We are of the opinion that rain coming after this will not help wheat or oats. * * * Thousands of gang plows are running, plowing under wheat. In regard to plow trade this fall, will say that we do not expect to sell a gang plow this season. * * * Furthermore, if the farmers bought, they could not pay, so there would be no special object in selling, if they were willing to buy. * * * We did not want to let this matter run on until December, and then tell you that we could not pay. We know now that we will be unable to make collections for the goods we have sold, and we do not feel like putting out any more on this crop. * * * We will make this proposition to you, which is really the best we

can suggest at this time: We will turn you over your plows, and afford you free transfer charges and storage and insurance for any plows that you will carry over until next season. We thought best to place this matter before you early in the season so that you could protect yourself, rather than wait until it was too late.

* * * Yours truly, Fargo Storage & Transfer Co." On June 30, 1900, respondent replied as follows: "Yours of the 28th received, and we are quite surprised at the attitude you take. Of course, we have carried these goods already for a year, and have had our money tied up in the material and labor represented by this shipment very nearly a year and a half already, as we have to make these goods up for some time before they are shipped. We are not in a position to carry the whole load here, by any means, and, as you have a very liberal contract with us, by which you have had the goods carried one year, which is not customary in our other deals, we shall certainly expect you to settle up for this car.

* * * We have depended on the money that will be due us on the 1st of December, and cannot at this time see our way clear to say that we will extend the time. * * * Yours truly. * * *

P. S. You have probably overlooked the fact that you are entitled to 10 per cent discount on your indebtedness to us if you pay it the 1st of September, and we don't see how you can very well afford to let this opportunity go by." On June 28, 1900, Mr. Downes, respondent's salesman, and the person who made the contract with appellant in behalf of respondent, replied to appellant's letter as follows: "Your kind favor received and note fully what you say about crop conditions. * * * We will, however, have to let the deal stand as it is for the present. I have no doubt but that I can get the factory to allow any reasonable request made of them this season. They are a very liberal firm, and I think we can arrange matters regarding goods on hand at the end of the season, in such a way as will be entirely satisfactory to you. Very truly, P. J. Downes." The next correspondence appears to have taken place in 1901, respondent writing to the appellant as follows: "Ft. Madison, Ia., Nov. 27, 1901. Fargo Transfer & Storage Co., Fargo, N. D.—Gentlemen: Please send us a list of goods that you have on hand at the present time, together with a report of all goods you have shipped out to any of our other customers. We desire this so that we may get your account checked up, and we would like to have it as soon as you can possibly get around to

it. Yours truly, Morrison Mfg. Co." To which appellant replied on November 30, 1901, as follows: "Replying to yours of the 27th inst., we have on hand here for your account 19 fourteen-inch M. B. gang plows and 29 extra shares. Of the 9 extra shares short to complete gangs, 5 was short on original shipment, as per notation on your invoice, and 4 were sold to local trade by us. We have no orders to ship any of your goods to your other customers. Yours truly, Fargo Storage & Transfer Co." On December 4, 1901, respondent wrote appellant as follows: "Answering your letter of the 30th, will say that we thank you very kindly for the information you gave us regarding goods on hand, and we herewith enclose you statement of account showing \$9.34 due for shares sold. Yours truly, Morrison Mfg Co." And on December 11, 1901, appellant wrote respondent as follows: "Herewith we hand you check for \$9.34 in settlement for fourteen-inch shares sold by us from your stock on hand here. Yours truly, Fargo Storage & Transfer Co."

The next correspondence in the form of letters between these parties was had on January 28, 1904, when respondent wrote appellant as follows: "Yours of the 26th received, saying that you have some gang plows belonging to us in your warehouse. There is a mistake about this, because we have no gang plows there. These gang plows were sold to the Fargo Storage & Transfer Co., and we have their written order and contract for the same, and it is long past due. We have been negotiating with them to try to get them to pay it up, but they have so far failed to pay, and we are preparing to commence suit against them and will push it with all the vigor we can to see who is right. We have a clear and unmistakable contract covering this car of gang plows and our attorney says that it is perfectly good; so it is immaterial to us what you do with the plows, as we do not claim ownership, but we do claim that the company are owing us and we are going to bring suit. * * * Yours truly, Morrison Mfg. Co." The above letter was addressed to the Northwestern Port Huron Company, the successors to the Fargo Storage & Transfer Company.

In 1901 certain statements of account were rendered by respondent to appellant as follows:

"November 21, 1900.

"Fargo Storage & Transfer Co., to Morrison Manufacturing
Co., Dr.

Nov. 7, 1899, To mdse.		\$1,160 00
Dec. 1, By 19 plows O. H.....	\$1,102 00	
By disc. at 10% on \$58.....	5 80	
By cash	52 20	
	<hr/>	
	\$1,160 00	\$1,160 00

1900 settlement.

"We send you this statement to be checked over with invoices represented herein so that any error may be detected and corrected before the time of payment as indicated on invoices and contract. Kindly report at once any error."

On December 4, 1901, another statement was rendered as follows:

"Fargo Storage & Transfer Co., to Morrison Manufacturing
Co., Dr.

Nov. 7, 1899, To mdse. for transfer		\$1,160 00
Credit	\$52 20	
Discount	5 80	58 00
	<hr/>	
		\$1,102 00
Goods on hand:		
19 M. B. gangs less 5 shares		\$1,102 00
Less 4 shares sold ...	\$14 00	
33½ per cent	4 66	9 34 1,092 66
	<hr/>	
	\$ 9 34	\$ 9 34

On November 30, 1901, a statement was rendered, as follows:

"Fargo Storage & Transfer Co., to Morrison Manufacturing
Co., Dr.

1899		
Nov. 7. To mdse.		\$1,160 00
1900		
Dec. 7. By cash	\$52 20	
By disc.	5 80	\$ 58 00 \$1,102 00

It appears from an inspection of the original exhibit, and from the testimony in the case, that the statement rendered on November 21st did not credit appellant with goods on hand, but that

this credit was entered upon such statement in lead pencil, probably after its receipt by appellant. This statement, as well as the one rendered on November 30th, harmonize with respondent's theory of the contract, but the statement rendered on December 4th debits appellant with "mdse for transfer," and appellant relies upon this in support of its contention as to the nature of the contract. It is quite apparent, however, that this expression was inadvertently used, as the same is not contained in the other statements. What we said above in regard to the lead pencil memorandum of credit for goods on hand in the statement of date November 21st equally applies to the statement rendered on December 4th.

From a careful consideration of the foregoing evidence, we would be unable to say, even if such contract could be held to be ambiguous and therefore subject to be explained by parol, that the parties intended to enter into an agreement merely for storage and transfer. While some of the evidence, no doubt, has a tendency to prove this fact, it is quite apparent, from a consideration of all the evidence, that a sale, and not a bailment, was intended. The letter written on June 28, 1900, by appellant to respondent, clearly shows this. If the contract did not create the relation of debtor and creditor, and was not so understood by appellant, then why was the following language used in said letter? "We did not want to let this matter run on until December, and then tell you we could not pay. We know now that we will be unable to make collections for the goods we have sold, and we do not feel like putting out any more on this crop." Surely the foregoing language is wholly inconsistent with appellant's theory of the contract. If defendant was not to pay for the plows until it had collected from customers for sales made, why this letter? Under its theory, the crop conditions were of no concern to it. Again, in respondent's reply thereto, dated June 30, 1900, respondent makes use of the following very significant expressions: "Yours of the 28th received, and we are quite surprised at the attitude you take. Of course, we have carried these goods already for a year, and have had our money tied up in the material and labor represented by this shipment very nearly a year and a half already, as we have to make these goods up some time before they are shipped. We are not in a position to carry the whole load here, by any means, and as you have a very liberal contract with us, by which you have had the goods carried one year, which is not customary in our other

deals, we shall certainly expect you to settle up for this car. * *

* We have depended on the money that will be due us on the 1st of December, and cannot at this time see our way clear to say that we will extend the time." With the exception of the statement of account rendered on December 4th, the letters and statements rendered by respondent to appellant, when considered in the light of the other testimony in the case, are entirely consistent with respondent's theory that said contract was a sale, and not a bailment of the property therein mentioned. We are therefore of the opinion that the contract, when construed, both by its plain provisions and by the subsequent conduct of the parties, must be held to be a sale and not a bailment of the property, and by its provisions the appellant became indebted to respondent for the purchase price of the property, and it remains only for us to consider the last point raised by appellant, which is that the trial court erred in computing interest from December 4, 1901. Appellant says: "This was error. for the obvious reason that no demand was ever made for the payment of money until the commencement of the action." Appellant's counsel evidently contends that a demand was necessary in order to recover interest. The indebtedness, by the terms of the contract, was due and payable December 1, 1900. Upon the maturity of such indebtedness, appellant might bring suit without a previous demand, and it needs no citation of authorities upon the proposition that it was entitled to recover interest from the date such indebtedness was due. The purchase price of all goods not sold in 1899 became due, under the terms of the contract, on December 1, 1900, and respondent was entitled to recover interest from that date. The stipulation. "Goods herein ordered unsold this season shall become due and payable same terms 1900," has reference merely to the date upon which the purchase price of the plows should become payable. If this provision of the contract is to be interpreted as contended for by appellant, it is strange that the parties did not provide in plain language that the goods were to be paid for only when sold. It is clear that the purchase price of all goods, whether sold or not, was due and payable under the contract not later than December 1, 1900, and that interest should be computed from said date on any balance then due. The trial court allowed interest only from December 4, 1901. This was error in appellant's favor.

It follows, from what we have said, that appellant's assignments of error should be overruled and the judgment appealed from affirmed; and it is so ordered. All concur.

(113 N. W. 605.)

ALFRED MOSHER v. EUGENIA MOSHER.

Opinion filed Sept. 9, 1907.

Divorce — Cruelty — Mental Characteristics.

1. The habitual use of profane language, and the telling of obscene stories by the wife to the husband and to third parties, in his presence and against his wishes, furnishes a ground for divorce, where it appears that the mental and other characteristics of the husband are such that this course of conduct on the part of the wife causes him humiliation and grievous mental suffering.

Same — Mental Suffering.

2. A continuous course of fault-finding, threats, and other acts, intended to aggravate and annoy the other party to a marriage, though each act is trifling in itself, may cause such a degree of mental suffering as to constitute a ground for divorce on the charge of extreme cruelty.

Same — Statements of One Spouse Provoked by Conduct of the Other Not Grounds for Divorce.

3. The rule of *McAllister v. McAllister*, 7 N. D. 324, 75 N. W. 256, that where one party to a marriage has by her conduct caused the other party to make statements based upon such conduct, which, if not so caused, might be ground for divorce, is adhered to; and *held* that such statements when so caused do not constitute a ground for divorce.

Same — Condonation Revoked Revives Original Cause.

4. Condonation is revoked and the original cause for divorce revived by the guilty party resuming the former course of ill-treatment.

Appeal — Trial De Novo.

5. The Supreme Court has the power, under section 7229, Rev. Codes 1905, to determine all the issues between the parties involved in an action appealed under said section.

Divorce — Allowance of Alimony by Supreme Court.

6. The Supreme Court has jurisdiction to consider applications for temporary alimony, counsel fees and suit money, after the district court has lost jurisdiction; but such applications will not

be considered as a matter of course, and should be made in the district court whenever there is reasonable opportunity to present them intelligently to the court before appeal.

Action by Alfred Mosher against Eugenia Mosher. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. F. Callahan and M. A. Hildreth, for appellant.

It is a sufficient answer to a petition for a divorce that petitioner was regardless of his conjugal duties. *Skinner v. Skinner*, 5 Wis. 449; *Poor v. Poor*, 8 N. H. 308; *Best v. Best*, 1st Adams, 410; *Holden v. Holden*, 1st Hagg. R. 453; *Wood v. Wood*, 2 Paige, 108; *Bishop on Marriage and Divorce*, Chap. 20 and 22; *Bedell v. Bedell*, 1st J. C. R. 604; *Watkins v. Watkins*, 2 Ark. 96; *Waldron v. Waldron*, 9 L. R. A. 489, 4 Barb. 320; *Johnson v. Johnson*, 4 Wis. 154, 4 Johnson Chc. 187; 2 Md. Chc. 341; *Bishop on Marriage and Divorce*, 454 and 459; 15 Ill. 186.

Chas. E. Stowers and Engerud, Holt & Frame, for respondents.

Much weight will be given the views of the trial court, in a case of this kind. *Mahnken v. Mahnken*, 9 N. D. 188, 82 N. W. 870; *Fleming v. Fleming*, 30 Pac. 566.

Passive endurance or conjugal kindness are not evidence of condonation, unaccompanied by express agreement to condone. *Taylor v. Taylor*, 5 N. D. 58, 63 N. W. 893; Rev. Codes 1905, section 4060.

SPALDING, J. Action by Alfred Mosher against Eugenia Mosher for divorce, on the ground of extreme cruelty, consisting in intentionally worrying and annoying the plaintiff, and pursuing a systematic course of ill treatment, using profane language, and telling obscene stories, and other acts, all of which are alleged to have caused the plaintiff grievous mental suffering. The defendant denies these charges, and asks affirmative relief, charging the plaintiff with failing to provide her with the necessaries of life, and with repeatedly accusing her of having married him from mercenary motives, and of her having loved other men, and of her having illicit intercourse with other men. The answer also sets out that the plaintiff is the owner of property to the amount of \$24,000, and asks for suit money and permanent alimony in the

sum of \$5,000. The plaintiff replied, denying the charges of the defendant, and also that he is the owner of property of the value of \$24,000, and alleges that he is worth a very much smaller sum, and that his property is incumbered in the amount of \$3,600.

The trial court granted a decree to the plaintiff, and we think it was justified in doing so. It appears that plaintiff was a widower, with married children living within a few miles of his home at Erie, a very small village in Cass county. He is 71 years of age, and the defendant is about 46 years of age. The plaintiff is a farmer apparently accustomed to living economically, but it does not appear that he was parsimonious to any greater extent than thrifty, saving farmers usually are. His residence was very comfortably furnished, and he appears to have provided the necessities of life, and the defendant's claim that he did not do so arises from his failure to obtain items for household consumption which she requested him to procure on different occasions, on some of which his failure was by reason of inability to procure them at Erie, where they resided. On one or two occasions when she requested certain articles to be procured, he suggested that she might be able to use something else as a substitute. The defendant is a nurse by profession, and married the plaintiff about two months after their first meeting, she having been the one to solicit an introduction, and having been twice before married. Testimony is introduced showing that before promising to marry the plaintiff she desired to know what provision he would make for her in a financial way, and that she told different people that she had worked long enough, and wanted a home, and was willing to marry any one to secure it, and preferred an old man to a young man, and that she most certainly would not have married him if he had had no money. One of the witnesses testified that she told her that she preferred to marry an old man, because she would probably get the property sooner, and that after marriage she contemplated separation, and procuring a settlement of the property in her favor. After separation came by her leaving him, she had her attorney write immediately to the plaintiff, soliciting an arrangement for a division of the property. From the evidence on this branch of the case, it appears that her desire to acquire property was an important factor in the marriage. They lived together some time over one year, during which time she repeatedly threatened to leave him, and the evidence indicates that she was planning to

cause the plaintiff, by her aggravating conduct, to so far forget himself as to turn her out of doors, thereby laying the ground for an action of divorce in her own favor.

The plaintiff was a religious man, had been a church member for 35 years, and did not tolerate profanity or vulgarity in his family. One of the principal charges against the defendant was that she was very profane in her conversation in the presence of the plaintiff, and sometimes of third parties, and that she repeatedly told in his presence, and in the presence of his children, obscene stories, some of which are related by witnesses, and it is charged that these were the cause of grievous mental suffering on the part of the plaintiff, and the trial court so found. We cannot assume that the finding of the trial court is erroneous in the absence of evidence to the contrary. Whether the telling of obscene stories and the use of profanity by the wife in the presence of the husband and others is the cause of grievous mental suffering on the part of the husband depends very largely upon the temperament, religious training, and characteristics of the man, and his degree of sensitiveness to such improprieties. We can imagine a man whose moral nature may be so inactive as to render such conduct on the part of the wife inoffensive, but we think a great majority of men would be humiliated and chagrined by such conduct, which would cause in most cases more grievous mental suffering than other acts more violent in their nature. The evidence on this subject, taken as a whole, we think clearly indicates that it had the effect on the plaintiff which might be expected in a man of ordinary sensibilities and of a high standard of propriety. No general rule can be laid down on this subject, but each case where charges of this nature are made must be governed by its own peculiar facts.

Many other acts are shown to have been committed by the defendant, some of them trifling, and the most of them so, but occurring as they did, at short intervals, in the way they did, they constitute a continuous course of conduct intended to aggravate and annoy the plaintiff. We shall not enter into details regarding these acts, as to do so would serve no purpose, and it is sufficient to say that, taken together, we are of the opinion that they warranted the judgment of the trial court. There is no issue of the marriage. The plaintiff, so far as the records disclose, was patient and considerate to a high degree. The fault-findings, threaten-

ings, and complaints of the defendant seldom brought any retort from him.

The defendant claims that the charges made against her by the plaintiff entitle her to a decree. To this we cannot agree. The allegations of the answer state these much stronger than the evidence supports. Whatever the plaintiff may have said, seeming to reflect upon the defendant in this respect, was occasioned by her own conduct. There is no evidence in the case establishing that she was guilty of unfaithfulness, but there is evidence of indiscretion, and a kind of brazen delight on her part in doing and saying things, not only wanting in propriety, but highly improper, and we are of the opinion that the record contains enough such evidence to bring this case within the rule established by this court in *McAllister v. McAllister*, 7 N. D. 324, 75 N. W. 256, to the effect that, her own conduct being the cause of any statement or insinuation on the part of the plaintiff reflecting upon her, such statements, even if made by the husband, do not constitute a ground for divorce. It is further contended by the defendant that the record shows condonation by the plaintiff. Some time prior to the final separation they met at the residence of a relative in Wheatland, and each party stated his or her version of their troubles in the presence of others, and, after spending some hours in their consideration, they were advised to start anew, and it is claimed that this constituted condonation. Section 4061, Rev. Codes 1905, reads: "Condonation is revoked and the original cause of divorce revived: (1) When the condonee commits acts constituting a like or other cause for divorce; or, (2) when the condonee is guilty of great conjugal unkindness, not amounting to cause of divorce, but sufficiently habitual to show that the conditions of condonation had not been accepted in good faith or not fulfilled." If there was at this time a condonation, and it is not clear that there was, the record shows that almost immediately the defendant resumed her former course of conduct towards the plaintiff, and thereby revoked the condonation, and revived the original cause for divorce. *Taylor v. Taylor*, 5 N. D. 58, 63 N. W. 893.

The printed evidence in this case occupies over 300 pages. Considerable of it is immaterial, and of a frivolous character, which would not be offered in any case except one involving a family quarrel. It would serve no purpose to set it out in this opinion.

It cannot be expected that either party will be absolutely spotless. The day is past when the court holds to any such doctrine. It is beyond the possibilities of human nature that the husband shall never give way to or express his indignation, when the wife nags, threatens and pesters him daily during their married life, and takes delight in calling his attention to foolish and indiscreet acts of her own, which she knew would, and evidently intended should, arouse suspicion and jealousy on his part. The plaintiff may be subject to censure in some particulars, but we think it is shown that, considering the record made by the defendant, he conducted himself with a high degree of circumspection and exhibited great self-restraint.

One other point requires consideration. April 11, 1905, the district court entered an order requiring the plaintiff to pay the defendant \$75 suit money, \$100 attorney's fees, and \$25 per month temporary alimony, during the pendency of this action. On June 26, 1906, a further order was entered requiring the plaintiff to pay defendant for printing abstract and brief \$175 and for clerk's fees \$12.50, and an additional \$150 for counsel fees. The original judgment was entered August 31, 1905, and the appeal taken the 30th day of August, 1906, and on the 26th day of March, 1907, application was made to the district court for a further allowance to defendant in the sum of \$500 counsel fees, \$5 for surety bond on appeal, and \$80.25 costs for printing abstract and brief. On the hearing the counsel moved to dismiss the application upon the grounds and for the reason that the district court had lost jurisdiction of the case by its having been appealed to the Supreme Court. The learned judge of the district court before whom the application was heard took the same view of the law as taken by the counsel for the plaintiff, and denied the application, and in his order denying it stated that, in the former order, he had intended to make the allowance sufficient to pay the cost of printing the abstract and brief of the defendant and the incidental expenses, but that the expenditure had been greater than was anticipated by the sum of \$90.25; that, if he had known the exact amount needed, he would have made the order cover this additional sum, and that he would have done so upon application had he deemed it within the power of the district court to do so. Before the argument of the appeal in this court, the defendant appeared and submitted an application for an allowance in the sum of \$90.25

for printing and other sums for counsel fees. On such application, the plaintiff appeared by his attorney, and contended that the Supreme Court had no jurisdiction in the premises, but that the matter was solely within the jurisdiction of the district court. This court might rest the matter by holding that the plaintiff having succeeded in convincing the district court that its jurisdiction was lost, and that the Supreme Court alone had jurisdiction of such application after appeal, he would not be heard to deny the power of this court to grant such an order; and ample authority might be cited to support this doctrine, but, as this question has not been passed upon by this court, we have decided to consider it very briefly on its merits, and construe the law applicable thereto. Section 4071, Rev. Codes 1905, provides that, while an action for divorce is pending, the court may in its discretion make allowance, etc. This action is appealed under section 7229, Rev. Codes 1905, and is an action wherein the Supreme Court has power, and it is made its duty, to finally determine the issues between the parties by trying the case *de novo* on the same evidence submitted to the district court. Appellate courts are held to have jurisdiction to make such allowance on either one of two grounds. Many states construe the word "court," as used in section 4071, Rev. Codes 1905, as referring to the court in which the action is pending at the time the application is made, and that, when the appeal is perfected, all proceedings in the lower court are stayed, and that the appellate court now has complete jurisdiction over the parties. It is unnecessary for us to determine this question, because we are agreed that this court has the inherent power at all times after appeal to allow the wife from the estate of the husband the means necessary to enable her to prosecute or defend the action. The power is incident to divorce cases. The statute on this subject is confirmatory of the common law.

This is supported by a long array of authorities, of which we cite only a few. Nelson, in his work on Divorce, says: "Where the practice is not controlled by the statute, the ordinary rules of practice, as well as the plain principles of law, would suggest that the jurisdiction of the lower court is lost when the appeal is perfected. When the appeal is perfected, all proceedings in the lower court are stayed, and the application must be made to the appellate court which now has complete jurisdiction over the parties. *

* * The appellate court has the inherent power to allow alimony

and counsel fees, although not authorized by any statutory provision on this subject; for the jurisdiction to review decrees of divorce carries with it by implication the incidental power to make such allowances. * * * It must be conceded that the appellate court retains at all times its inherent power to compel the husband to furnish the wife means to prosecute or defend the appeal, and that such court cannot be deprived of such power without express prohibition." Nelson on Divorce, section 863. *Lake v. Lake*, 17 Nev. 230, 30 Pac. 878; *Pleyte v. Pleyte*, 15 Colo. 125, 25 Pac. 25; *Van Voorhis v. Van Voorhis*, 90 Mich. 276, 51 N. W. 281; *Disborough v. Disborough*, 51 N. J. Eq. 306, 28 Atl. 3; *Pollock v. Pollock*, 7 S. D. 331, 64 N. W. 165; *Grant v. Grant*, 5 S. D. 17, 57 N. W. 1130; *Freind v. Freind*, 65 Wis. 412, 27 N. W. 34; *Chaffee v. Chaffee*, 14 Mich. 463; *Drake v. Drake* (S. D.) 110 N. W. 270; *Phillips v. Phillips*, 27 Wis. 252; *Goldsmith v. Goldsmith*, 6 Mich. 285.

We cannot agree with the respondent's contention that this allowance should not be made, because the appellant has been able to effect her appeal without it. He contends that such allowance should only be made to enable her to procure services or printing when she would otherwise be unable to do so. Some courts do adhere to this strict rule, but our Code provides that this allowance may be made in the discretion of the court to enable the wife to prosecute or defend the action. The construction which limits this literally to the question of her ultimate ability to prosecute or defend is extremely technical. She may have friends able or willing to provide the funds, or some printer may have confidence enough in her case to take his chances on future payment, and give her credit in the necessary amount. The printing may be done for the attorneys representing her, and the fact that she may be able on the strength or one or all of these considerations to procure the necessary printing to get her side of the case before the court in no way relieves the husband of his obligation to provide these necessities for the wife. This seems to us to be an especially strong requirement when the husband is the plaintiff. He brings his wife into court either with or without cause, and then denies to her the necessary funds with which to establish her innocence or maintain her good name. He owns the property, and she has neither property nor money. The fact that she may have credit to a limited extent should not work to her disadvantage in

making the proper presentation of her version of the family difficulties. We do not mean to intimate that she should be upheld in incurring credit beyond the bare necessities of the case, but the courts will protect the husband against abuse of this privilege. The correct rule, as we think, is that she should be placed upon an equality in this respect with her husband. In view of the statement made in the order of the district court, we think the defendant should be allowed the sum of \$90.25 for additional expense of printing, and we allow the same. This action must not, however, be taken to indicate that this court will take jurisdiction of such applications as a matter of course. Whenever there is a reasonable opportunity to intelligently present them to the district court before an appeal is perfected, they should be heard in that court. We do not allow the application of defendant for additional attorney fees. The allowance already made is fairly liberal, and the record shows that it was partially made for the purpose of enabling the defendant to perfect her appeal. The value of the legal services could be determined at the time the various applications were acted upon by the district court. No new facts or necessities appear to have arisen requiring an increase of such allowance. While the appellant had the whole record, which was quite voluminous, printed, the legal questions involved were simple and required comparatively little research. In view of these facts, we do not feel justified in allowing any additional sum for this purpose.

The judgment of the district court is affirmed. All concur.
(113 N. W. 99.)

G. L. BARRON V. THE NORTHERN PACIFIC RAILWAY COMPANY.

Opinion filed Sept. 10, 1907.

Damages — Loss of Time — Injuries to Passenger — Instruction — Evidence.

1. In an action to recover for injuries to the person of the plaintiff by reason of the negligence of the defendant, while the plaintiff was a passenger riding in one of its cabooses, it was error justifying the trial court in granting a new trial to instruct the jury to take into consideration the loss of time occasioned plaintiff by the injuries complained of in fixing the amount of damages, when no loss of time was pleaded and no evidence offered showing the value of his time, the extent of his business, or giving the jury any facts on which to base a finding for loss of time.

and counsel fees, although not authorized by any statutory provision on this subject; for the jurisdiction to review decrees of divorce carries with it by implication the incidental power to make such allowances. * * * It must be conceded that the appellate court retains at all times its inherent power to compel the husband to furnish the wife means to prosecute or defend the appeal, and that such court cannot be deprived of such power without express prohibition." Nelson on Divorce, section 863. *Lake v. Lake*, 17 Nev. 230, 30 Pac. 878; *Pleyte v. Pleyte*, 15 Colo. 125, 25 Pac. 25; *Van Voorhis v. Van Voorhis*, 90 Mich. 276, 51 N. W. 281; *Disborough v. Disborough*, 51 N. J. Eq. 306, 28 Atl. 3; *Pollock v. Pollock*, 7 S. D. 331, 64 N. W. 165; *Grant v. Grant*, 5 S. D. 17, 57 N. W. 1130; *Freind v. Freind*, 65 Wis. 412, 27 N. W. 34; *Chaffee v. Chaffee*, 14 Mich. 463; *Drake v. Drake* (S. D.) 110 N. W. 270; *Phillips v. Phillips*, 27 Wis. 252; *Goldsmith v. Goldsmith*, 6 Mich. 285.

We cannot agree with the respondent's contention that this allowance should not be made, because the appellant has been able to effect her appeal without it. He contends that such allowance should only be made to enable her to procure services or printing when she would otherwise be unable to do so. Some courts do adhere to this strict rule, but our Code provides that this allowance may be made in the discretion of the court to enable the wife to prosecute or defend the action. The construction which limits this literally to the question of her ultimate ability to prosecute or defend is extremely technical. She may have friends able or willing to provide the funds, or some printer may have confidence enough in her case to take his chances on future payment, and give her credit in the necessary amount. The printing may be done for the attorneys representing her, and the fact that she may be able on the strength or one or all of these considerations to procure the necessary printing to get her side of the case before the court in no way relieves the husband of his obligation to provide these necessities for the wife. This seems to us to be an especially strong requirement when the husband is the plaintiff. He brings his wife into court either with or without cause, and then denies to her the necessary funds with which to establish her innocence or maintain her good name. He owns the property, and she has neither property nor money. The fact that she may have credit to a limited extent should not work to her disadvantage in

making the proper presentation of her version of the family difficulties. We do not mean to intimate that she should be upheld in incurring credit beyond the bare necessities of the case, but the courts will protect the husband against abuse of this privilege. The correct rule, as we think, is that she should be placed upon an equality in this respect with her husband. In view of the statement made in the order of the district court, we think the defendant should be allowed the sum of \$90.25 for additional expense of printing, and we allow the same. This action must not, however, be taken to indicate that this court will take jurisdiction of such applications as a matter of course. Whenever there is a reasonable opportunity to intelligently present them to the district court before an appeal is perfected, they should be heard in that court. We do not allow the application of defendant for additional attorney fees. The allowance already made is fairly liberal, and the record shows that it was partially made for the purpose of enabling the defendant to perfect her appeal. The value of the legal services could be determined at the time the various applications were acted upon by the district court. No new facts or necessities appear to have arisen requiring an increase of such allowance. While the appellant had the whole record, which was quite voluminous, printed, the legal questions involved were simple and required comparatively little research. In view of these facts, we do not feel justified in allowing any additional sum for this purpose. The judgment of the district court is affirmed. All concur. (113 N. W. 99.)

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Damages — Loss of Time — Injuries to Passenger — Instruction — Evidence.

1. In an action to recover for injuries to the person of the plaintiff by reason of the negligence of the defendant, while the plaintiff was a passenger riding in one of its cabooses, it was error justifying the trial court in granting a new trial to instruct the jury to take into consideration the loss of time occasioned plaintiff by the injuries complained of in fixing the amount of damages, when no loss of time was pleaded and no evidence offered showing the value of his time, the extent of his business, or giving the jury any facts on which to base a finding for loss of time.

Same — Error Presumed from Erroneous Instruction.

2. This court cannot assume that the jury found only nominal damages for loss of time, when the court gave on erroneous instruction on damages for loss of time caused by the injury, on the strength of which the jury may have materially increased its finding as to the amount of damage.

Instructions — Must be Evidence to Sustain.

3. When actual pecuniary damages are sought for loss of time, some evidence must be given showing such loss and its value to support an instruction to the jury to consider loss of time in fixing damages.

Action by G. L. Barron against the Northern Pacific Railway Company. Verdict for plaintiff. From an order granting a new trial, he appeals.

Affirmed.

E. R. Sinkler, for appellant.

New trial will not be granted upon newly discovered evidence, which with reasonable diligence could have been produced on the trial. 14 Pleading and Practice, 799; *Ninninger v. Know*, 8 Minn. 140; *Austin v. Northern Pac. Ry. Co.*, 25 N. W. 798; *Broat v. Moore*, 47 N. W. 55; *Nelson v. Carlson*, 55 N. W. 821.

Due diligence to produce must be shown by facts constituting the same. *Boot v. Brewster*, 36 N. W. 649; *Calahan v. Calahan*, 48 N. W. 724; *Moody v. Priest*, 28 N. W. 415; *Fenno v. Chapin*, 8 N. W. 760; *Evans v. Christopherson*, 24 Minn. 331.

W. B. Kellogg and Ball, Watson & Young, for respondent.

It is error to give instructions that have no application to the evidence. *Nicklous v. Burns*, 75 Ind. 93; *Smith v. Evans*, 14 N. W. 406; *Esterly Harvesting Machine Co. v. Frolkey*, 51 N. W. 594.

Application for new trial based on newly discovered evidence is addressed to the discretion of the court, and its order will be sustained unless abuse is manifest. *Pengilly v. Case Threshing Mach. Co.*, 11 N. D. 249, 91 N. W. 59; *Ross v. Robertson*, 12 N. D. 27, 94 N. W. 765; *Patch v. Northern Pac. Ry. Co.*, 5 N. D. 55, 63 N. W. 207.

When it is uncertain upon which of several grounds a new trial is granted if either is sufficient, the order will be sustained. *Davis v. Jacobson*, 13 N. D. 430, 101 N. W. 314.

SPALDING, J. The plaintiff was injured by the collision of a caboose in which he was riding, with other cars, at the city of Grafton, in this state, on the 19th of July, 1904. This action was brought for the purpose of recovering damages for the injuries which he sustained, and especially for the loss of hearing in one ear, claimed to be the result of such accident. No claim was made in the complaint for any loss of time, and the only evidence set out relating to loss of time resulting from the accident is found in the question: "How long did it affect your capacity to work?" And the plaintiff answered: "Upwards of two months it bothered me, or thereabouts." The record contains no evidence as to the value of his time or services, or any other information from which it could be even approximately ascertained. The court instructed the jury, among other things, that, if they found the plaintiff entitled to recover damages, they had a right to take into consideration the loss of time, if any, the plaintiff had suffered. To this portion of the charge the defendant excepted. The jury returned a verdict for the plaintiff in the sum of \$900, and the defendant moved for a new trial, on the ground of errors occurring at the trial, among others being the instruction of the court to the jury relating to the loss of time of the plaintiff. The trial court granted the motion for a new trial without specifying the grounds upon which its order was based.

We do not know on what assigned error the trial court granted the motion for a new trial. It may have considered only one as sufficient, or it may have thought a combination of errors necessary. We, however, shall only consider one of the several assigned on the motion, as in our view of the case that furnished sufficient reason for granting defendant's motion. It is clear to us that it was justified in granting a new trial for its error in instructing the jury to take into consideration the loss of time occasioned plaintiff by the accident, at least without limiting its finding for such loss to nominal damages only. Nominal damages are the most that the courts allow in such cases without evidence of the nature of the occupation of the injured party, the value of his time, and such other facts as may throw light on this element

of damage. No evidence was submitted to show any of these things, and the jury was thrown upon its own resources in arriving at the measure of compensation for this item, and its action of necessity became mere guesswork. It is argued that the amount of the verdict was not excessive, and therefore it was not error. Neither the trial court nor this court has any means of determining the amount the verdict was increased by reason of this portion of the charge, and it cannot assume that only nominal damages were allowed. The court was not justified in instructing the jury to consider something which it could only do by mere inference. It is the province of the trial court to instruct the jury on the law as it relates to the facts disclosed by the evidence under the pleadings, and we cannot say that the jury was not misled by this instruction, or that it did not increase the allowance in the verdict by more than nominal damages for loss of time. If instructions to consider matters neither pleaded nor in evidence are proper, the rules of evidence may as well be wiped off the books. This is elementary, but we cite a few authorities. *Leeds v. Metropolitan Gaslight Company*, 90 N. Y. 26, is directly in point, and in that case the judgment of the trial court was reversed for error in instructing the jury that the plaintiff was entitled to recover for loss of time when no facts on which to base the value of the time had been shown, and the court says: "When actual pecuniary damages are sought, some evidence must be given showing their existence or extent. If this is not done, the jury cannot indulge in an arbitrary estimate of their own." *Sedgwick on Damages*, sections 180, 483; *Smith v. Evans*, 13 Neb. 314, 14 N. W. 406; *Esterly Harv. Machine Company v. Frolkey*, 34 Neb. 110, 51 N. W. 594; *Galveston, H. & S. A. R. Co. v. Thornsberry (Tex.)* 17 S. W. 521; 5 Am. & Eng. Enc. Law, 718.

The appellant attempts to distinguish between a charge to find a verdict for loss of time and one, as in the case at bar, to "consider loss of time," in determining the amount of damages. He does not contend that the former would be permissible. We are unable to discover a distinction. The case was being tried to determine whether plaintiff had been injured by defendant's negligence, the jury was there to find the facts as disclosed by the evidence and fix the damages, the court to instruct the jury as to the law, and an instruction to consider loss of time in arriving at the damages in dollars and cents could have but one mean-

ing and the jury could have drawn only one conclusion from it, and this would be that the jurors should, regardless of the lack of evidence on the subject, give damages for loss of time, and that such damages should be arrived at, not from the evidence before them, but from their own ideas, with no legal grounds disclosed on which an award could be supported. The court had not instructed them on the distinction between nominal and actual damages, and they were left to guess or speculate as to the compensation for the loss of time.

The order of the district court is affirmed, with costs. All concur.

(113 N. W. 102.)

A. O. MADSON V. HERMAN RUTTEN, SHERIFF OF RAMSEY COUNTY,
NORTH DAKOTA.

Opinion filed October 23, 1907.

Trial — Motion for Directed Verdict — Renewal at Close of Evidence.

1. Error cannot be predicated upon the ruling of the trial court in denying defendant's motion for a directed verdict made at the close of plaintiff's case in chief, where defendant subsequently introduces evidence, and does not renew his motion at the close of all the evidence. Such ruling, if error, was thereby waived by the defendant.

Chattel Mortgages on Stock of Merchandise — Power of Sale Without Accounting.

2. A chattel mortgage upon a stock of merchandise which contains a stipulation authorizing the mortgagor to sell the same in the ordinary course of business at retail, without requiring the net proceeds of such sale to be applied upon the mortgage indebtedness, is conclusively deemed to be fraudulent and void as to the creditors of the mortgagor.

Same.

3. The fact that the mortgagee under such mortgage takes possession of the mortgaged property pursuant to the terms of the mortgage for the purpose of foreclosure, before a creditor of the mortgagor asserts his rights, does not operate to validate such instrument or in any manner affect the rights of such creditor. But where the mortgagee in good faith takes possession of the property and in due form forecloses the mortgage, and sells the property to a third person for full value, such purchaser acquires a good title to the property, and the creditors of the mortgagor cannot pursue the same in his hands.

Same — After Acquired Property — Intention of Parties.

4. It was the intention of the parties to the mortgage as disclosed by such instrument that additions made from time to time for the purpose of replenishing the stock should be included in and covered by a lien of such mortgage, and this intent will be given effect.

Same — Attachment of Mortgaged Property — Waiver of Lien.

5. It was claimed that the mortgagee caused a writ of attachment to be levied upon the property in question, and thereby waived the lien of the mortgage. Whether such a levy was made is not determined as such levy, if made, would not have this effect under the facts disclosed in the record.

Appeal — Evidence — Error Without Prejudice.

6. Certain rulings of the trial court, relating to the admissibility of evidence examined, and *held* not prejudicial.

Same — Discretion — Order of Proof.

7. This court will not reverse the trial court on account of receiving evidence out of its proper order, except in a clear case of abuse of discretion.

Action by A. O. Madson against Herman Rutten, as sheriff, for refusal to make a levy under a warrant of attachment. Judgment for plaintiff, and defendant appeals.

Reversed, and a new trial ordered.

B. D. Townsend, for appellant.

Creditors can assail the validity of the mortgage only while the property mortgaged was the mortgagor's. *Sullivan et al. v. Miller*, 13 N. E. 772; *Wolcott v. Ashenfelter*, 23 Pac. 780; *Parker v. American Ex. Bank*, 27 S. W. 1071; *Barton v. Sitlington*, 30 S. W. 514; *Gregory v. Whedon*, 1 N. W. 309; *Ayers, et al. v. Sundback*, 58 N. W. 4; *Blakeslee v. Rossman*, 43 Wis. 116; *Read v. Wilson*, 22 Ill. 377; *Cameron v. Marvin*, 26 Kan. 612; 11 *Cobbey Chat. Mortgages*, Secs. 765, 770, 773, 774, 941; *Jones on Chat-tel Mortgages*, sections 178, 333, 345, 350.

Burke & Middaugh and *Murphy & Duggan*, for respondent.

Commingleing of goods subject to mortgage with those not so subject, by mortgagee, makes all subject to attachment. *Graham v. Plate*, 40 Cal. 593; *Tufts v. McClintock*, 28 Me. 295; *Root v. Bonema*, 22 Wis. 539; *Jenkins v. Steanka*, 19 Wis. 126; *Williams v. Morrison*, 28 Fed. 873; 6 *Am. & Eng. Enc. Law* (2d. Ed.) 596;

Daumel v. Gorman, 6 Cal. 43; Robinson v. Holt, 39 N. H. 557; Wilson v. Lane, 33 N. H. 466; Lewis v. Whittemore, 5 N. H. 364.

There is no error in admission of evidence where there is no prejudice. Vidger v. Grt. No. Ry. Co., 107 N. W. 1083, 15 N. D. 501.

FISK, J. This appeal is from a judgment rendered by the district court of Ramsey county pursuant to a verdict directed in respondent's favor. The action was brought to recover damages on account of appellant's refusal to make a levy under a warrant of attachment upon certain personal property claimed to be the property of one John H. Jones, who was defendant in an action commenced by this respondent in the district court of Grand Forks county, in which action such warrant of attachment was issued. The principal question involved is as to whether Jones, in so far as his creditors were concerned, was the owner of this merchandise (being a stock of confectionery) at the time the warrant of attachment came into the hands of the appellant. At the close of plaintiff's case in chief, defendant moved for a directed verdict in his favor, which motion was denied, and at the close of all the evidence plaintiff moved for a directed verdict in his favor, which motion was granted. Numerous assignments of error are set forth in appellant's brief, but it will be unnecessary to consider them separately. They relate to the court's refusal to grant appellant's motion for a directed verdict, the granting of respondent's motion, and the rulings of the trial court on the admissibility of certain evidence.

Whether it was error to deny appellant's motion for a directed verdict it is unnecessary for us to decide, as such ruling, if error, was waived by appellant by thereafter submitting evidence and by not renewing such motion at the close of all the evidence. Bowman v. Eppinger, 1 N. D. 21, 44 N. W. 1000; Colby v. McDermont, 6 N. D. 495, 71 N. W. 772; Tetrault v. O'Connor, 8 N. D. 15, 76 N. W. 225; Bank v. Bank, 9 N. D. 319, 83 N. W. 221; Ward v. McQueen, 13 N. D. 153, 100 N. W. 253.

Was it error to grant plaintiff's motion for a directed verdict? Appellant's counsel earnestly insist that this question must be answered in the affirmative, for two reasons. He contends (1) that there was no evidence showing that Jones, the defendant in the attachment suit, owned any of the property in question at the time

the warrant of attachment came into the hands of appellant; and (2) that whatever title Jones theretofore possessed in the property had vested in one S. L. Wineman prior to the date on which such warrant of attachment was placed in appellant's hands by virtue of the foreclosure sale thereof pursuant to the power of sale contained in a certain chattel mortgage executed by said Jones upon the property on March 11, 1901. It is contended by respondent's counsel that this mortgage was void upon its face as to creditors, because by its terms it covered a stock of merchandise and authorized the mortgagor to remain in possession of and to sell the same in the ordinary course of business, at retail, without accounting for and applying upon the indebtedness secured by the mortgage the net receipts from such sales; and they also contend that this mortgage did not include renewals of stock and hence that such mortgage did not cover the property in controversy. It is necessary to a full understanding of the questions involved to briefly refer to the facts. As stated in appellant's brief: "On the 11th day of March, 1901, Louise Roble sold a certain stock of cigars and confectionery to John H. Jones. In part payment of the purchase price, Jones executed and delivered to Roble 48 promissory notes, each for the sum of \$25, one of which notes was due and payable on the 10th day of each month, commencing May 10, 1901. To secure the payment of said notes, Jones mortgaged said stock of merchandise to Roble on said 11th day of March, 1901. By the terms of such mortgage, Jones was permitted to remain in possession of said stock of goods and sell the same in the ordinary course of business at retail, 'for which purpose, and which purpose only, said second party does make and constitute said first party her agent to sell and dispose of the stock above described in the store where the same is now situated, at retail, and to keep an accurate account of such sales, and to pay over to said second party on the 10th day of each and every month, beginning with the 10th day of May, 1901, the sum of \$25, with interest thereon,' etc. The mortgage contained a provision that, if said stock of merchandise should be reduced in value to an amount less than \$1,800, the same should constitute a default. The stock became reduced in value to \$1,050, and on January 26, 1902, the mortgagee took possession of the same and foreclosed the mortgage, the sale taking place on February 8, 1902. At the time the foreclosure sale was taking place, fourteen wholesale firms claim-

ing to be creditors of Jones caused to be distributed among some of the bidders at the sale a notice stating that the mortgage aforesaid was void as against creditors because of its provision permitting the mortgagor to sell and dispose of the merchandise, and warning all persons not to become purchasers at said sale. Notwithstanding such notice, the sale proceeded and the property was purchased by S. L. Wineman for the sum of \$1,500. No action or proceedings of any kind was taken by any creditor or other person prior to the time of such foreclosure sale by which any person sought to acquire a lien upon said stock, or in any manner challenge the validity of the mortgage." After the foreclosure sale all of the persons having claims against Jones assigned them to respondent. On February 13, 1902, respondent commenced an action in the district court of Grand Forks county against Jones to recover the amount of said claim, which aggregated \$760.98. In that action a warrant of attachment was duly issued and delivered to appellant on February 14, 1902, for service. It is appellant's refusal to levy said warrant upon the property in question which is the subject of this action.

Was the evidence sufficient to show ownership of the property or any portion thereof in Jones on the date such warrant was placed in appellant's hands? If so, it was defendant's duty to levy said warrant of attachment. We think the evidence was amply sufficient to show such fact, unless Jones was divested of his ownership by the foreclosure sale to Wineman, and this calls in question the validity of such foreclosure sale, and whether all the property transferred to Wineman at the foreclosure sale was covered by the mortgage. Respondent's counsel contend that the mortgage was void as to the creditors of Jones, and that as a necessary consequence the foreclosure sale was also void, and did not operate to divest Jones of his ownership in the property as against them. Appellant's counsel contend, first, that such mortgage was valid; and, second, that, even though it were void as to creditors of Jones, still it was valid as between the parties, and the taking possession of the property by the mortgagee and the foreclosure and sale thereof under the mortgage pursuant to the power of sale contained therein, before being attacked by creditors operated to divest the mortgagor of ownership and transfer the title to the purchaser, and that the only remedy, if any, left to the creditors of the mortgagor, was to pursue the proceeds

of such sale. The authorities relied upon to support this argument are *Sullivan v. Miller*, 106 N. Y. 635, 13 N. E. 772; *Wolcott v. Ashenfelter*, 5 N. M. 442, 23 Pac. 780, 8 L. R. A. 691; *Parker v. Bank* (Tex. Civ. App.) 27 S. W. 1071; *Barton v. Sitlington*, 128 Mo. 164, 30 S. W. 514; *Gregory v. Whedon*, 8 Neb. 373, 1 N. W. 309; *Ayers v. Sundback*, 5 S. D. 31, 58 N. W. 4; *Blakeslee v. Rossman*, 43 Wis. 126; *Read v. Wilson*, 22 Ill. 377, 74 Am. Dec. 159; *Cameron v. Marvin*, 26 Kan. 612; *Francisco v. Ryan*, 54 Ohio St. 307, 43 N. E. 1045, 56 Am. St. Rep. 711; *Kay v. Noll*, 20 Neb. 380, 30 N. W. 269; *Smith v. Roevers*, 55 Mo. App. 448; *Mallmann v. Harris*, 65 Mo. App. 127; 2 *Cobbey, Chattel Mortgages*, sections 765, 770, 773, 774, 941; *Jones, Chattel Mortgages*, sections 178, 333, 345, 350. Most of these cases merely announce the rule that where, after the execution of a mortgage, which is void as to creditors, the parties thereto make a new agreement under which possession of the mortgaged property is turned over to the mortgagee, a valid lien is thereby created. None of them go to the extent of holding, aside from the cases from Illinois and Missouri, that the mere taking possession of the property by the mortgagee for the purpose of foreclosure without the express consent or agreement of the mortgagor has the effect of validating such instrument. The great weight of authority, and, as we think, the better reasoned cases, hold that the mere fact that the mortgagee in such a mortgage takes possession of the property under the terms of the instrument for the purpose of foreclosure will not operate to validate the same and that the creditors may pursue the property in his hands. See *Blakeslee v. Rossman*, *supra*; *Janvrin v. Fogg*, 49 N. H. 340, 351; *Fearey v. Cummings*, 41 Mich. 376, 1 N. W. 946; *Mandeville v. Avery*, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678; *Stephens v. Perrine*, 143 N. Y. 476, 39 N. E. 11; *Rathbun v. Berry*, 49 Kan. 735, 31 Pac. 679, 33 Am. St. Rep. 389; *Wilson v. Voight*, 9 Colo. 614, 13 Pac. 726; *Gallagher v. Rosenfield*, 47 Minn. 507, 50 N. W. 696; *Stein v. Munch*, 24 Minn. 390; *Durr v. Wildish*, 108 Wis. 401, 84 N. W. 437; *Baumbach Co. v. Bobkirk*, 104 Wis. 488, 80 N. W. 740; *Wells v. Langbein* (C. C.) 20 Fed. 183; *In re Beede* (D. C.) 138 Fed. 441; 2 *Cobbey, Chart. Mtges.*, section 795; *Jones, Ch. Mtges.* (4th Ed.) section 409. *Blakeslee v. Rossman*, *supra*, is a leading case upon the subject, and the able opinion of that distinguished jurist, Chief Justice Ryan, is deserving of careful perusal.

Our attention has been called to no case, however, and we have found none, going to the extent of holding that where, under such a mortgage, the mortgagee has in good faith and for the purpose of satisfying a bona fide indebtedness secured by such mortgage, not only taken possession of the property for the purpose of foreclosure, but, in fact, has foreclosed in due form and sold the property to a bona fide purchaser for full value, that the creditors can thereafter pursue the property in the hands of such purchaser. It seems to us that it would be a strange rule which would permit creditors of the mortgagor to wait until bona fide purchasers who are strangers to the mortgage have invested their cash in the property and then levy upon the same as the property of their debtor and subject it to the payment of their claims. Even though the mortgage was voidable as to the creditors of the mortgagor, still, as between the parties, it was effective, and therefore a foreclosure sale under the power therein contained, if fully consummated before the plaintiff's warrant of attachment was issued, we think would operate to transfer title from the mortgagor to the purchaser at such sale, especially when such purchaser is not a party to the mortgage, and paid full value for the property without notice of the claims of such creditors. We cannot yield our assent to the rule contended for by respondent's counsel. We think the fallacy of their argument consists in the fact that they treat the mortgage as void in the strict sense of the word; but it is not void. It is merely voidable. It is a perfectly valid instrument as between the parties and all persons, except creditors of the mortgagor who may choose to avoid the same. And, if the creditors do not attack, we see no reason why the mortgagee cannot realize upon the security through a foreclosure sale, the same as he could do if the instrument was perfectly valid. If this be sound, then the mortgagor would, by such foreclosure sale, be completely divested of his title to the property whether purchased by a third person or by the mortgagee himself. Of course, if the instrument was absolutely void, then no act of the mortgagee in taking possession under the mortgage or in foreclosing the same could operate to divest Jones of his interest in the property. The rule which is universally recognized to the effect that such a mortgage is valid between the parties, although void as to creditors, simply means that, in the absence of interference by the creditors of the mortgagor, the mortgage shall have full force and effect the same as any

other mortgage, but that it shall in no manner obstruct or interfere with the right of creditors to pursue the property covered thereby, while the same is owned by the mortgagor, whether the possession of such property is still in the mortgagor or whether the mortgagee has taken and retained the same under the terms of the instrument for the purpose of foreclosure. The property remains subject to attachment at the suit of creditors of the mortgagor until such time as he has been divested of the title by a foreclosure sale. It would be both unreasonable and grossly inequitable to carry the rule further than this, and permit creditors to pursue such property after it has passed into the hands of the purchaser for value and in good faith at the foreclosure sale. It will not be contended that if there had been no mortgage, Jones, the mortgagor, could not have made a valid sale of the property under which the same would have passed beyond the reach of such attacking creditors, but it is in effect asserted that he could not give a mortgage, perfectly valid between the parties, under which his title to the property could be transferred under a foreclosure sale pursuant to the power contained in such mortgage.

Having arrived at the above conclusion, it is unnecessary for us to determine the question as to the validity of the mortgage referred to, but we will briefly notice this point. As before stated, it was given to secure the payment of 48 promissory notes of \$25 each, payable on the 10th day of each month, and covered a stock of confectionery and fixtures sold by the mortgagee to the mortgagor. By a stipulation in the mortgage, the latter was permitted to remain in possession and to make sales in the ordinary course of business, at retail, but no provision was contained therein requiring the net proceeds of such sales to be applied upon the mortgaged indebtedness. It permitted the mortgagor to conduct the business in every respect the same as if such mortgage was not in existence. He was permitted to sell for cash or on credit, at his option, and was not required to render accounts of the business to the mortgagee, nor, what is still more fatal, was he required to turn over any portion of the receipts from sales other than the monthly payments of \$25 aforesaid to be applied upon the mortgage debt. Therefore, the inevitable result of this mortgage was to hinder and delay the mortgagor's general creditors. That the same was fraudulent in law and therefore voidable as to creditors we entertain no doubt. This is too apparent for discussion. The

mortgage involved in *Bergman v. Jones*, 10 N. D. 520, 88 N. W. 284, 88 Am. St. Rep. 739, was less vicious in this respect than the instrument in the case at bar, and the rule there announced is controlling. Under nearly all the authorities, such a mortgage has been held invalid as against creditors of the mortgagor.

It is contended by respondent that the mortgage did not cover all the stock transferred to Wineman, and that to the extent of the goods not so covered no title was acquired by him, but that the same was on February 14th still the property of Jones, and hence subject to attachment by his creditors. This contention is based upon the theory that some of the goods were additions made to the stock after the mortgage was executed, and that by the terms of such instrument these additions were not included; but an examination of the mortgage as contained in the printed abstract convinces us that there is no merit in this contention. It was clearly the intention of the parties that additions to the stock made for the purpose of replenishing the same should be covered by the lien of the mortgage, and such intention will be given effect. This is well settled. *Ayres v. Sundback*, 5 S. D. 31, 58 N. W. 4; *Armstrong v. Ford*, 10 Wash. 64, 38 Pac. 866; *Cadwell v. Pray*, 41 Mich. 307, 2 N. W. 52.

It is also urged by respondent's counsel that the attempted foreclosure sale was void, and hence did not pass the title of the property to Wineman, for the reason, as stated, that Roble, the mortgagee, commenced an action against Jones to recover the purchase price of the property, and in such action caused an attachment to be levied upon the same, thereby waiving her right under the mortgage, and, further, that such property at the date of the sale was held under such attachment. The record is somewhat vague and uncertain as to the facts regarding these attachment proceedings, and we are unable to determine just what took place. It clearly appears, however, that immediately upon taking possession of the property under the mortgage Roble proceeded to advertise and sell the same in the usual manner pursuant to the power of sale contained in the instrument, and even if she caused the property to be seized under the writ of attachment, which we do not determine, her subsequent conduct shows that she must have released and abandoned such levy, and in any event it appears to be well settled that she did not by such attachment waive the lien of the mortgage. *Byram v. Stout*, 127 Ind. 195, 26 N. E. 687; *Thurber*

v. Jewett, 3 Mich. 295; Ellinwood v. Holt, 60 N. H. 57; Barchard v. Kohn, 157 Ill. 579, 41 N. E. 902, 29 L. R. A. 803.

This brings us to appellant's assignments of error relating to the rulings of the trial court as to the admissibility of certain evidence. By these rulings certain witnesses were not permitted to answer questions propounded to them by defendant's counsel. No offer of proof was made, and it does not appear that defendant was in any way prejudiced by such rulings, even conceding that they were erroneous. Hence error cannot be predicated thereon. Halley v. Folsom, 1 N. D. 325, 48 N. W. 219; Mordhorst v. Telephone Co., 28 Neb. 610, 44 N. W. 469.

Certain evidence was admitted over appellant's objection that the same was not proper rebuttal testimony, and appellant assigns error thereon. It is unnecessary for us to decide whether defendant's objections were well founded, as an appellate court will not reverse the trial court on account of receiving evidence out of its proper order, except in a clear case of abuse of discretion. No such abuse of discretion is disclosed by the evidence. Petersburg School District v. Peterson, 14 N. D. 351, 103 N. W. 756; State v. Werner (N. D.) 112 N. W. 60. It is unnecessary for us to notice these assignments further.

For the foregoing reasons, the judgment appealed from must be reversed, and a new trial ordered. All concur.

(113 N. W. 872.)

EMERSON K. BULL V. CLARA A. BEISEKER AND THOMAS L. BEISEKER

Opinion filed Oct. 23, 1907.

Persons Entitled to Enforce Real Covenants — Remote Grantee — Pleading.

1. A complaint in an action brought by the assignee of a remote grantee to recover damages for breach of covenants in a deed to real property, which the complaint alleges that the covenanter neither had title to nor possession of at the time of the execution and delivery of such deed, and fails to allege any transfer of such cause of action by the covenantee to plaintiff's assignor, does not state facts sufficient to constitute a cause of action.

Same — Failure of Title or Possession, Covenants Do not Run With the Land.

2. Where the covenanter has neither title nor possession, the covenants do not run with the land, so as to transfer the cause of

action for the breach thereof to remote grantees by operation of assumed conveyances of the property by the execution and delivery of deeds purporting to convey the same.

Same — Breach — Constructive Eviction — Remedy.

3. If a grantor assumes to convey real property with full covenants of warranty when he has neither title nor possession, there is at once a constructive eviction of the grantee, which entitles him to the same remedies which he would have had if he had been evicted from actual possession.

Same — Privity of Estate or Contract.

4. In order to recover in such an action, plaintiff must allege and prove either privity of estate or of contract.

Void Foreclosure — Color of Title Does Not Carry Constructive Possession.

5. A mere naked color of title, derived through a void foreclosure, does not draw to it even the constructive possession of the property, and therefore does not operate to vest any estate or interest in the property, and cannot confer any such estate or interest by mere lapse of time.

Action by Emerson K. Bull against Clara A. Beiseker and others. From an order sustaining a demurrer to the complaint, plaintiff appeals.

Affirmed.

J. W. Bull and Newton & Dullam, for appellant.

Publication of foreclosure notice for less than 42 days is void. *Finlayson v. Peterson*, 5 N. D. 587, 67 N. W. 953; *Dever v. Cornwall*, 10 N. D. 123, 86 N. W. 227.

Whether the covenant runs with land depends upon privity of contract, not upon the character of the title passed by the conveyance. *Allan v. Kennedy*, 91 Mo. 330; *Kimbal v. Bryant*, 25 Minn. 496; *Schofield v. Iowa Homestead Co.*, 32 Iowa, 318.

R. A. Palmeter and Turner & Wright, and *Robert G. Morrison*, for respondents.

For title to run with the land, some interest in the property must be passed. Rev. Codes 1905, section 5229.

Covenants run with the land but damages from broken covenants do not. 8 Am. & Eng. Enc. Law. (2d Ed.) 156; *Parsons*

v. Council Bluffs, 45 Iowa, 652; Stodgill v. Chicago, B. & Q. Ry., 5 N. W. 495; 1 Smith's Leading Cases (8th Ed.) 205.

Constructive eviction affords same remedies as actual. *McInnis v. Lyman*, 22 N. W. 405; *Michal v. Alexander*, 28 Wis. 118; *McLennan v. Prentice*, 45 N. W. 943; *Wallace v. Pereles*, 85 N. W. 371; *Dahl v. Stakke*, 12 N. D. 325, 96 N. W. 353.

Covenant of a stranger to title does not run with land. 1 *Jones on Real Property*, section 942; 2 *Wash. R. Pr.* (6th Ed.) section 1203; *Mygatt v. Coe*, 46 N. E. 949; 11 *Cyc.* 1097, 1098, 1099, 1100; 8 *Am. & Eng. Enc. Law* (2d Ed.) 151; 2 *Mod. Law R. Property*, section 401; *Hubbard v. Norton*, 10 Conn. 433; *Mitchell v. Warner*, 5 Conn. 503; *Davis v. Lyman*, 6 Conn. 255; *Ballard v. Child*, 34 Me. 355; *Chapman v. Kimball*, 7 Neb. 399; *Davidson v. Cox*, 10 Neb. 150; *Kennedy v. Norton*, 10 Heisk. 384; *Galliher v. Galliher*, 10 Lea, 23; *Moore v. Merrill*, 17 N. H. 75, 43 *Am. Dec.* 593; *Peters v. Bowman*, 98 U. S. 56.

Grantee cannot sue a remote grantor for breach of covenant occurring in latter's time. 1 *Smith Leading Cases* (9th Ed.) 234; *Mygatt v. Coe*, supra; *Bestwood v. McGwin*, 29 So. 399; *Allen, Admr. v. Greene*, 19 Ala. 40; *Mitchell v. Warner*, 5 Conn. 497; *Whitney v. Dinsmore*, 60 Mass. 124; *Gan v. Sandford*, 12 N. J. Law, 2611; *Keegan v. O'Callaghan*, 35 App. Ct. Ill. 143; *Indianapolis Water Co. v. Nulte*, 126 Ind. 373; *Pyle v. Gross*, 92 Md. 132; *Barklay v. Steers et al.*, 47 La. Ann. 952; *Hunt v. Curtis*, 19 Pick. 459; *Ladd v. Noyes*, 137 Mass. 151; *Smith v. Richards*, 135 Mass. 79; *Sheldon v. Codman*, 57 Mass. 318; *Prov. Life & Trust Co. v. Seidel*, 147 Pa. St. 232; *Hurd v. Curtis*, 19 Pick. 459; *Bronson v. Coffin*, 108 Mass. 181; *Wheeler v. Schad*, 7 Nev. 204; *Chapman v. Kimball*, 7 Neb. 399; *Davidson v. Cox*, 10 Neb. 153; *Real et al. v. Hollister*, 29 N. W. 189; *Mygatt v. Coe*, supra; *Bowne v. Wolcott*, 1 N. D. 497, 48 N. W. 336; *N. P. Ry. Co. v. McClure et al.*, 9 N. D. 73, 81 N. W. 52; *Prov. L. & S. Co. v. Fiss*, 147 Pa. State, 240; *Pigeon River Lumber & I. Co. v. Ninus*, 48 S. W. 391; *McConaughy v. Bennett, executors*, 40 S. E. 541; *Beardsley v. Knight*, 4 Vt. 471; *Devore v. Sunderland*, 17 Ohio, 52; *Martin v. Gordon*, 24 Ga. 533; *Burntners v. Karan*, 23 Grat. 42; *McInnis v. Lyman*, 22 N. W. 405; *McLennan v. Prentice*, 45 N. W. 943; *Wallace v. Pereles*, 85 N. W. 371.

FISK, J. Plaintiff, an assignee of a remote grantee in a deed purporting to convey certain real property, brought this action in the district court of Wells county to recover damages against defendants, who are remote grantors, for the breach of certain covenants contained in the latter's deed to their immediate grantee, one Charles A. Johnson. The complaint alleges that at the date such deed was executed and delivered by defendants to the said Johnson they had no right, title or interest in the real property therein described, nor had they the possession thereof. The complaint then alleges the execution and delivery of a deed of such premises by the said Johnson to one W. D. Washburn, who thereafter, in order to obtain title to said land, was obliged to and did purchase title to the same from the owner, one J. W. Bull, and as a portion of the consideration therefor the said Washburn, at the request of the said J. W. Bull, assigned to plaintiff herein the cause of action which he claimed to have against defendants for breach of the covenants in the latter's deed to Johnson, amounting to \$1,120 and interest; such sum being the consideration paid by Johnson to defendants for such deed. Defendants demurred to the complaint upon the ground that it failed to allege facts sufficient to constitute a cause of action. The district court sustained the demurrer, and to reverse such order this appeal is prosecuted.

We think the demurrer was properly sustained. From the facts disclosed by the complaint, it is apparent that Washburn had no cause of action against defendants which he could assign to plaintiff. The action was brought and the complaint framed upon the mistaken theory that the covenants contained in defendants' deed to Johnson were covenants running with the land, and therefore passed to Washburn by the deed from Johnson to him. This probably would be true if any title or possession was transferred by such conveyances; but under the facts alleged in the complaint neither title nor possession, actual or constructive, passed under the deeds, and hence there was nothing for the covenants to run with. There was a constructive eviction of the grantee immediately upon the execution and delivery of the deed to Johnson, and a cause of action for breach of the covenants in such deed at once arose in his favor against the Beisekers to recover damages therefor, and the deed from Johnson to Washburn did not operate to assign to the latter such cause of action. While a few isolated cases may be found holding to the contrary, we think the correct

rule, and the one supported by the overwhelming weight of authority, is to the effect that a cause of action for breach of a covenant in a deed under which neither title nor possession is transferred does not pass to the grantee of the covenant by the mere execution and delivery of a deed from the latter to the former, as the covenants in such a deed do not run with the land.

It is true, as counsel for appellant say, that defendants had color of title at the time of executing the deed to Johnson; but such mere color of title was not accompanied by actual possession of the property, and did not draw to it even the constructive possession thereof, such constructive possession following the legal title. Therefore such mere naked color of title would not ripen into a title by lapse of time, as suggested by appellant. It would serve no useful purpose to review the many adjudicated cases upon this question, and we will content ourselves by calling attention to the following: *Bowne v. Wolcott*, 1 N. D. 500, 48 N. W. 426; *N. P. Ry. Co. v. McClure*, 9 N. D. 73, 81 N. W. 52, 47 L. R. A. 149; *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. 405; *Wallace v. Pereles*, 109 Wis. 316, 85 N. W. 371, 53 L. R. A. 644, 83 Am. St. Rep. 898; *Mygatt v. Coe*, 152 N. Y. 457, 46 N. E. 949, 57 Am. St. Rep. 521; *Ladd v. Noyes*, 137 Mass. 151; *Real et al. v. Hollister*, 20 Neb. 112, 29 N. W. 189; *Chapman v. Kimball*, 7 Neb. 399; *Davidson v. Cox*, 10 Neb. 153, 4 N. W. 1035; 8 Am. & Eng. Enc. Law (2d Ed.) 149, 151; 11 Cyc. 1097-1100, and numerous cases cited; 1 *Jones on Law of Real Prop.*, section 942; 2 *Washburn, Real Prop.* (6th Ed.) section 1203; note to 1 *Smith's Lead. Cas.* (8th Ed.) 205.

Section 5229 of our Revised Codes, referred to by appellant's counsel, in no manner changes the rule almost universally announced by the courts of this country as enunciated in the foregoing authorities. This section merely provides that certain covenants in grants of estates in real property pass with them, so as to bind the assigns of the covenantor and vest in the assigns of the covenantee in the same manner as if they had personally entered into them. "Such covenants are said to run with the land." The section merely attempts to define what covenants run with the land. In order that covenants may run with the land, it is apparent that some interest in the property must be granted; and, as we have heretofore observed, no interest whatever was granted by defendants to Johnson according to the facts alleged in the complaint.

The conclusion above reached makes it unnecessary to consider the other points raised by counsel.

The order appealed from is affirmed. All concur.

(113 N. W. 870.)

TORBER NELSON, GAYVE THOMPSON, TORRA SOLUM, CHARLES KIT-
TLESON AND THONE SALEMOMSON V. JULIA THOMPSON AND F.
R. FULTON.

Opinion filed June 12, 1907.

Evidence — Opinion Evidence — Sanity.

1. Opinions of witnesses are in general irrelevant. Certain exceptions to this rule, however, exist. Where, for example, the witness is asked to testify from his observation in talking with a person whether in his opinion that person's mind was clear, and whether he was sane or insane.

Deeds — Capacity to Execute.

2. The test of whether a person is competent to make a deed is that he should be qualified to do that particular business rationally—not on the one hand, that he should be capable of doing all kinds of business with judgment and discretion, nor, on the other, that he should be wholly deprived of reason, so as to be incapable of doing the most familiar and trifling work. *Held*, that the evidence in this case shows the grantor in a deed to have been competent to execute the same.

Appeal from District Court, Grand Forks county; *Fisk*, J.

Action by Torber Nelson and others against Julia Thompson. From a judgment for plaintiffs, defendant appeals.

Reversed, and judgment ordered for defendant.

Skulason & Skulason and *Frank B. Feetham*, for appellant.

One who knowingly, though passively, suffers another to purchase and expend money on land, without disclosing his claim, cannot exercise his legal right against such person. *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79; *Town v. Needham*, 25 Am. Dec. 246; *Starrs v. Barker*, 10 Am. Dec. 316; *Brown v. Bowen*, 30 N. Y. 519; *Brown v. Bowen*, 86 Am. Dec. 406; *Anderson v. Hubbell*, 47 A. R. 394; *Fletcher v. Holmes*, 25 Ind. 458; *Blair v. Wail*, 69 N. Y. 113.

Plaintiff's action is barred by statute of limitations. Rev. Codes 1899, sections 5207, 5211, 5212; *Houts v. Hoyne*, 84 N. W. 773; *Pollock et al. v. Wright et al.*, 87 N. W. 584; *Wood on Limitations*, chapter 6; *White v. Sheldon*, 4 Nev. 280; *Pilcher v. Flinn*, 30 Ind. 202.

Where statute of limitations bars the ancestor, it bars the heirs. *Wood on Limitation*, 9; *Uptegrove v. Blum*, 10 Atl. 787.

Statute of limitations run against insane persons, unless it specifically exempts them. *Wood on Limitations*, 571; 19 Enc. of Law, 212, 237, 240; *Northrop v. Marquam*, 18 Pac. 449; *Dunham v. Sage*, 52 N. Y. 229; *Acker v. Acker*, 81 N. Y. 145; *McNeil v. Sigler*, 64 N. W. 604.

R. M. Carothers and Guy C. H. Corliss, for respondent.

A person without mental capacity cannot contract. *Jackson v. King*, 4 Cow. 207; *Dennett v. Dennett*, 44 N. H. 531; *Concord v. Rumney*, 45 N. H. 423; *Hovey v. Chase*, 52 Me. 304, 83 Am. Dec. 514; *Sawyer v. White*, 122 Fed. 223; *Edwards v. Davenport*, 20 Fed. 756; *Ring v. Lawless*, 60 N. E. 881; 16 Am. & Eng. Enc. Law, 1624, 1725.

If the mind does not know what it is doing, it is immaterial what caused the condition or what mentality there is for other purposes. *German S. & L. Soc. v. De Lashmut*, 67 Fed. 399; *Delafield v. Parish*, 25 N. Y. 9; *Rogers v. Blackwell*, 49 Mich. 912, 13 N. W. 512; *Van Deusen v. Sweet*, 51 N. Y. 378; *Griswold v. Butler*, 3 Conn. 227; *Elder v. Schumacher*, 33 Pac. 175; *Corbit v. Smith*, 7 Iowa, 60; *Dexter v. Hall*, 15 Wall. 9, 21 L. Ed. 73; *Johnson v. Harmon*, 94 U. S. 371, 24 L. Ed. 271; *Plaster v. Rigney*, 97 Fed. 12; *Dougherty v. Powe*, 30 So. 524; 13 Cyc. 573.

Where the transaction is not a business one, and no real value is received by the lunatic, the deed is absolutely void. *Elliott v. Ince*, 7 De. G. M. G. 475, 44 Eng. R. Rep. 186; *Wooley v. Gaines*, 39 S. E. 892; *Riley v. Carter*, 25 Atl. 667; *Evans v. Horan*, 52 Md. 610; *Baldwin v. Smyth*, 1 Ch. 588; *Brigham v. Fayerweather*, 144 Mass. 48; 2 Pom. Eq. Jur. 946; *Fay v. Burdett*, 81 Ind. 433; *Lincoln v. Buckmaster*, 32 Vt. 652; *Halley v. Troester*, 72 Mo. 73; *Eaton v. Eaton*, 8 Am. Rep. 716; *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. Rep. 766; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Hanley v. Nat. L. & I. Co.*, 29 S. E. 1002.

Where there is a consideration and the grantee is innocent, grantor need not restore. *Seaver v. Phelps*, 11 Pick. 305; *Gibson v. Soper*, 6 Gray, 279; *Hovey v. Hobson*, 89 Am. Dec. 708; *Crawford v. Scoville*, 94 Pa. St. 48; *Chew v. Bank*, 14 Md. 318.

Grantor has until recovery of his reason to disaffirm. *Boynton v. Reese*, 37 S. E. 437; *Spicer v. Holbrook*, 66 S. W. 180; *Downham v. Halloway*, 64 N. E. 82; *Hull v. Louth*, 10 N. E. 270; *Boynton v. Reese*, 37 S. E. 437.

After grantor's death right is in the heirs. *Robers v. Blackwell*, 49 Mich. 192; *French Lumbering Co. v. Theriault*, 83 N. W. 927; *Hunt v. Rabitoay*, 84 N. W. 59; *Burm v. Postell*, 33 S. E. 707; 9 Enc. Law, 119, 120.

Nothing being paid, heirs could evince disaffirmance by bringing suit. *Gibson v. Soper*, 6 Gray, 279, 280; *Hull v. Louth*, *supra*; *Valpey v. Rea*, 130 Mass. 384; *Brigham v. Fayerweather*, 144 Mass. 48; *Elder v. Schumacher*, 33 Pac. 175; *Burnham v. Mitchell*, 34 Wis. 117; *Crawford v. Scoville*, 94 Pa. St. 48; *Phillips v. Gorham*, 17 N. Y. 270; *Eaton v. Eaton*, 37 N. J. L. 108; *Brown v. Freed*, 43 Ind. 253; *Folsom v. Garner*, 15 Mo. 494; *Bensell v. Chancellor*, 5 Whart. 371; *Dexter v. Hall*, *supra*.

Heirs cannot rescind before ancestor's death. *Kilbie v. Myrick*, 12 Fla. 419; *McMillan v. Deering Co.*, 38 N. E. 398; *Baldwin v. Golde*, 34 N. Y. Supp. 587; *Brigham v. Fayerweather*, *supra*; *Riley v. Carter*, 25 Atl. 667, 669.

Where grantor cannot disaffirm, the law will for him. *Spicer v. Holbrook*, 66 S. W. 180; *Brigham v. Fayerweather*, *supra*; *Rogers v. Blackwell*, 49 Mich. 192.

A cloud on title is a continuing wrong and never outlaws: *Cameron v. Lewis*, 59 Miss. 134; *Mut. Life Ins. Co. v. Corely*, 7 N. Y. Supp. 939; *Quinn v. Kellogg*, 35 Pac. 49; *Minor v. Beekman*, 50 N. Y. 337; *Rockwell v. Servant*, 54 Ill. 251.

Deed of an insane person is void even against a bona fide purchaser. *German S. & L. Soc. v. De Lashmer*, 67 Fed. 399; *Rogers v. Blackwell*, 49 Mich. 192, 194; *Somers v. Pumphrey*, 24 Ind. 238; *More v. Abernethy*, 7 Blackf. 442; *Gates v. Carpenter*, 43 Iowa, 152; *Hovey v. Hobson*, 89 Am. Dec. 705; *Dewey v. Allgire*, 40 Am. St. Rep. 468; *Valentine v. Richardt*, 3 N. Y. Supp. 906; *Hull v. South*, 10 N. E. 270, 15 N. Y. Supp. 275; *Mustard v. Wohlford*, 15 Grat. 329, 340 (S. C.); 76 Am. Dec. 209, 213;

Harrod v. Meyers, 21 Ark. 592, 76 Am. Dec. 409; Brantley v. Wolff, 60 Miss. 420; McMorris v. Webb, 17 S. C. 558, 43 Am. Rep. 629; Jenkins v. Jenkins, 12 Iowa, 195, 200; Miles v. Linger-
man, 24 Ind. 385; Sims v. Smith, 86 Ind. 577; Buchanan v. Hub-
bard, 96 Ind. 1; Howard v. Simpkins, 70 Ga. 322; Hill v. Ander-
son, 5 Sm. & M. 216.

No tender being required, cancellation can be done by suit. Ludington v. Patton, 86 N. W. 571; Vial v. Reynolds, 23 N. E. 301; Berry v. A. C. Ins. Co., 30 N. E. 254; Allerton v. Allerton, 50 N. Y. 670; Gould v. Bank, 86 N. Y. 75; Taylor v. Nat. Bank, 62 N. W. 99; Knappen v. Freeman, 50 N. W. 533; Thrackrah v. Haas, 119 U. S. 499, 30 L. Ed. 486; O'Dell v. Burnham, 21 N. W. 635; Maloy v. Berkin, 27 Pac. 442; Thomas v. Beales, 27 N. E. 1004; Kley v. Healy, 28 N. E. 593.

One defeated in ejectment suit, cannot afterward sue on a dif-
ferent title held at its commencement. Fayerweather v. Ritch, 195
U. S. 276; United States v. Cal. & O. Land Co., 192 U. S. 355;
Hoseason v. Keegen, 59 N. E. 627; Wildman v. Wildman, 41 Atl.
1; Breeze v. Haley, 18 Pac. 551; Wolverton v. Baker, 33 Pac. 131;
Donnell v. Wright, 49 S. W. 874; Bassett v. Conn. R. Co., 22 N.
E. 890; Foster v. Hinson, 39 N. W. 682; Werlin v. New Orleans,
177 U. S. 390; Lamb v. McConkey, 40 N. W. 77; Springer v. Dar-
lington, 64 N. E. 709; Kurtz v. Carr, 5 N. E. 692; Patterson v.
Wold, 33 Fed. 793.

A judgment does not bar a title acquired after the action in
which it was rendered was begun. 24 Am. & Eng. Enc. Law, 776,
777; People v. Holladay, 27 Am. St. 186; Valentine v. Mahoney,
37 Cal. 389; Bedford, etc., Co. v. Oman, 134 Fed. 64; Teigen
v. Drake, 101 N. W. 893; McLane v. Bovee, 35 Wis. 2734; Mur-
ray v. Green, 28 Pac. 61; Mitchell v. French, 100 Ind. 334; Mor-
rison v. Beckey, 6 Watts, 349; 1 Van Fleet Former Adjudication,
p. 374; State v. McEldowney, 47 S. E. 650; Headley v. Leavitt, 55
Atl. 731; Mershon v. Williams, 44 Atl. 211; Union Term. Co. v.
Wilmar & S. F. Ry. Co., 90 N. W. 92; People's Bank v. Hodgdon,
27 Pac. 938.

POLLOCK, District Judge. This action was instituted under the
statute to quiet title of the plaintiffs to the N. W. $\frac{1}{4}$ of section
17, tp. 149 N., range 49 W., of the Fifth P. M. The action was
tried by the court, and an appeal taken under section 7229, Rev.
Codes 1905, and is before this court for a trial de novo.

Certain facts are undisputed. It is conceded that one Kittel Olson was, prior to the 19th day of December, 1887, the owner in fee of the land in question, and that he died on or about the 2d day of August, 1903, leaving surviving him as his sole heirs at law the five plaintiffs, all of whom, except Thone Salemonson, being children, and Thone Salemonson being at the time of Kittel Olson's death, the sole surviving child of Ole Kittelson, a deceased child of Kittel Olson. The title of the plaintiffs to the land is good as against Julia Thompson, unless an alleged deed claimed to have been executed by Kittel Olson in his lifetime to the son Ole Kittelson in his lifetime, is sustained. The defendant, Julia Thompson, in her answer, by way of counterclaim, sets up and relies on this deed, which is dated December 19, 1887, and claims that the grantee therein, Ole Kittelson, died in December, 1888, leaving him surviving as his sole heirs at law the plaintiff Thone Salemonson and Charles O. Myron, his two children, and that by succession each inherited from their father an undivided half interest in the real estate in question, and that the defendant, Julia Thompson, succeeded to the one-half interest of Charles O. Myron by virtue of an attachment of his interest in the land by Julia Thompson in a suit brought against the said Myron for damages for breach of promise of marriage, and through the sale of said interest by her under execution upon the judgment rendered in such action, upon which sale she herself purchased said interest, and through the final judgment of the Supreme Court judging void as against said Julia Thompson the transfer by Charles O. Myron of his undivided half interest in said land to his sister, the plaintiff Thone Salemonson, previous to the levy of said attachment. For this succinct statement of facts, we are indebted to the valuable brief of counsel for the respondents. For the sake of clearness and for those who do not understand the peculiarities of the Scandinavian manner of giving names, we may say that the ancestor was Kittel Olson, his son was named Ole Kittelson, and his son was named Charles O. Myron. The issues were tried before the court without a jury. The court made his findings of fact, which, in substance, were that the alleged deed from Kittel Olson to Ole Kittelson was entirely without consideration; that the said Kittel Olson had no knowledge of what was taking place when he gave said deed, and was wholly without understanding as to the nature of said transaction, and was at said

time without sufficient understanding to be conscious of his ownership of the said land or the right to dispose of or control the same, and that the said Ole Kittelson at the time of obtaining said deed was fully aware of the condition of said Kittel Olson, his father. Judgment was therefore rendered in favor of the plaintiffs, on the theory that the deed referred to was void.

This court, after a careful investigation of all the evidence in the case, has arrived at an opposite conclusion, and must hold that the deed is valid. Such being the situation, it will be entirely unnecessary for us to discuss many questions of law which are presented by counsel for appellant, such as those growing out of estoppel, laches and *res adjudicata*, claimed by them to have existed because, this deed being valid, then it is a conceded fact and must follow from the whole record that the title of Julia Thompson to an undivided half interest in the land must be quieted in her.

1. Preliminary to a short discussion of the evidence, the court must pass upon the proper admission of certain of the testimony which was offered by counsel for respondents, and as often objected to by counsel for appellant. An illustration of the questions objected to would be the following, taken from the direct examination by Mr. Corliss, of Tora Solum, found at folio 219 of the abstract: "Q. From what you saw of your father's conduct after he had this trouble, and from what you observed about his absence of speech and answering 'Ya, ya,' and 'Nay, nay,' senselessly at times, and from all that you saw of him at that time, his conduct and everything else, what is your opinion—I do not ask you what you know, but what is your opinion as to whether your father had any idea of business at all?" Mr. Skulason objected to this line of questioning upon the grounds that it was not competent, was opinion evidence, irrelevant, immaterial and leading. "There is no more familiar principle in the law of evidence than that opinions of witnesses are in general irrelevant, even when witnesses are limited in their statements to facts within their own knowledge. Their bias, ignorance and disregard of the truth are obstacles which too often hinder in the investigation of the truth; but the general rule rejecting evidence as to the opinions of witnesses is subject to very important exceptions. It often happens that it is impossible for a witness to detail all the pertinent facts in such a manner as to enable a jury to form a conclusion with-

out the opinion of the witness. Indeed, the witness might not be able to separate the facts and indications from which he has formed a conclusion from the conclusion itself. Accordingly, a witness may testify to his own state of health. This is not a matter of opinion in the sense that it calls for expert testimony. So ordinary witnesses have been allowed to express opinions as to whether another person seemed to be suffering pain, or whether he seemed nervous or sad, or in pain or good health, or whether a person's mind seemed to be clear or had failed." Jones on Evidence, pars. 361, 362, and cases cited. In the case of the People v. Sanford, 43 Cal. 33, the court, referring to this class of testimony, says: "It approaches knowledge, and is knowledge, so far as the imperfection of human nature will permit knowledge of those things to be acquired, and the result thus acquired should be communicated to the jury because they have not had the opportunities of personal observation, and in no other way can they effectually have the benefit of the knowledge gained by the observation of the others." It would therefore appear that the objection to the introduction of such opinion testimony should be overruled.

2. The question is naturally suggested by the record in this case, in view of the provisions of section 4018 of the Revised Codes of 1905, which declares that a person entirely without understanding has no power to make a contract of any kind, just what those provisions mean when applied to facts like those in the case at bar. We are of the opinion that the rule as laid down in *Jackson v. King*, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354, is the correct one, viz., that, "upon the question of incapacity to render to deed invalid, they must be satisfied that the grantor was not in a situation to transact that particular business rationally—nor, on the one hand, that he should be capable of doing all kinds of business with judgment and discretion, nor, on the other that he should be wholly deprived of reason, so as to be incapable of doing the most familiar and trifling work, that, if the mind and memory were in such a situation at the time of executing the deed as to render him wholly incompetent to judge of his rights and interest in relation to that transaction, the deed would be void." Counsel for the respondents urge this rule as being the correct one to be applied. We are in perfect accord with him in this contention. They insist that the ancestor, Kittel Olson, was not in a situation to transact the particular business rationally of giving a deed to his son, Ole

Kittleson. But a study of this testimony leads us to the opposite conclusion.

To properly measure the testimony in this case, it will be necessary to take a broad view of the surrounding circumstances. We find a man of fair intelligence, a widower, living with his son, suddenly stricken with paralysis of the body and especially of the face and organs of speech. He was the owner and in possession of a quarter section of land, mortgaged to a certain extent, at a period when there was no great advance in the price of real estate, and long before the great advance which has come to lands in this country during the past 10 years. He permits his children to continue farming the land, everything runs along satisfactorily, and in the course of a few years a deed is given to the son who is then taking care of his father, and the evidence shows that this son agreed to provide his father with his future support in consideration of the deed. The old gentleman lives, regains his powers of locomotion, his ability to visit his neighbors, to receive the communion under the particular solemnities required by the Lutheran church, of which he was a member. The son dies, and the grandchildren, Thone Salemonson and Charles O. Myron, continue to care for the grandfather and fully carry out the agreement made by their father with him. For a period of over 17 years there was no move whatever made to set aside said conveyance or to disturb in any manner the relation of the land, in question. So far there would appear to be nothing unnatural in the transaction or anything which would be suggestive of fraud upon the part of the son, Ole Kittelson, in getting the deed. No brother or sister up to this time has been heard to suggest in any manner or form that the deed was not of binding force. When Ole Kittelson died, his estate was probated in the usual manner, and the title shown to be vested in Thone Salemonson and Charles O. Myron. There was no suggestion that these proceedings were carried on in any secret manner whatsoever, and, indeed, from the conditions surrounding the entire transaction, everything appears to have been done in a natural and orderly way. Not until an unfortunate act occurs, when it appears that Charles O. Myron committed a great wrong upon Julia Thompson, the defendant in this action, for which he was sued, judgment secured, and his interest in said land subjected to the payment thereof, do we approach the first suggestion that Kittel Olson was insane and his deed

should be avoided. This appears through an action which Thone Salemonson began, and through which it is shown that a fraud was attempted to be perpetrated upon Julia Thompson by the said Charles O. Myron in transferring his half interest in the land to his sister, hoping thereby to escape liability under the suit against him. This action was prosecuted, and this court, in the case of Salemonson v. Thompson, 101 N. W. 320, 13 N. D. 182, held that the acts of said Myron were in fraud of Julia Thompson, who was declared to be the owner of the half interest of Charles O. Myron in said land. Failing to secure the land by this means, they now go back to a transaction had 17 years previously, and by attempting to prove that the grandfather was insane, or at least not competent to give his deed, they seek to attack the bona fides of the original transaction which had rested in such apparent security for so long a period of time. A simple statement of these surrounding circumstances would suggest that, before the court should aid these plaintiffs in what must be their evident design, it should be convinced by evidence that is clear, satisfactory, convincing, and of such a character as to leave the mind of the court with no hesitation or substantial doubt that the facts contended for by the plaintiffs, and upon which they expect to have the deed declared void, are true.

Twenty-two witnesses were sworn. The larger number of those who testified for the plaintiffs were relatives and personally interested in the outcome of the litigation. Two or three witnesses for the defendant were likewise related in some manner to her. It is very clear from a reading of the testimony that all the witnesses who were related to one side or the other were largely influenced, and their testimony was highly colored by virtue of the fact of such relationship. The testimony of the plaintiffs went but very little into detail, and its greatest strength lay in the fact that it was their opinion that the ancestor, Kittel Olson, was non compos. This opinion comes from a class of witnesses who have for 17 years remained silent with reference to their ancestor's diseased state of mind, and now, in order to accomplish the purpose of setting aside the deed suddenly arrive at the opinion which they announce. As was stated above in the rule with reference to opinion evidence, "their bias is an obstacle which hinders in the investigation of the truth;" and, while the court permits this testimony to be considered, yet it does not believe that it rises to that

high state of credibility which leaves any lasting conviction upon the mind of the chancellor, and that it should not be allowed to control over as against certain other testimony which appears to show that the ancestor did have a sufficient capacity to transact the particular business of giving the deed. We find Kittel Olson, though paralyzed in his speech, sufficiently able to make his wants known, could quite largely care for himself by way of dressing, and otherwise, could make intelligent answers, 'Ya' and 'Nay' generally, although sometimes it would appear from the evidence that he became involved in his answers, not, however, to the extent that we should conclude otherwise than that there was a misunderstanding between him and the person who asked the question. And we further find him in the care of a son, between whom and himself and the other members of the family there does not appear to have been any unfriendly feelings. We find him simply giving the deed, after having been requested to many times, to his son, in order to provide for his future care and protection during the remainder of his life. He is not dealing with third parties who might take advantage of him, but is transacting business with those in whom he could put his trust, and it is very clear from the manner in which he was afterwards cared for that his trust was well founded. When, however, we approach the testimony of the witnesses, who, like Mr. Broton, were wholly without interest in the case, we find that in their opinion the deceased Kittel Olson was competent to make a deed. S. O. Broton, aged 53 years, a minister of the Gospel, had known Kittel Olson since 1885 or 1886. He lived $1\frac{1}{2}$ miles from him for a time. He saw him first in 1885, after the paralytic stroke, and was his pastor. Kittel Olson was present when the congregation in that vicinity was organized. The witness makes answers to questions as follows: "Q. What was his condition when you first got acquainted with him? A. He was in that condition as he was after he got the paralysis. Q. Just describe to the court, Mr. Broton, as well as you can, how his physical condition was? A. They sent for me that I should come and give him the Lord's Supper, the sacrament, and I have to examine every man when they are in that condition, that they can take it, because we in the Lutheran Church give only the sacrament to grown people that have their senses, that they know what they do, so when I came there I had special reason to examine him. Q. You knew that he was in this condition? A. Yes; I knew that and the first

time I examined him the best I could, but he couldn't talk, he couldn't say more than 'Ya, ya,' and 'Nay, nay,' and if he tried to say any more, that would be another kind of sounds as you have heard here, 'ah, ah, I, I.' That is when he tried to talk more than 'Ya' and 'Nay.' Q. His vocal organs were apparently paralyzed? A. Yes. I asked him if he knew what the sacrament meant, and if he knew what he was doing when he got the sacrament. He tried to talk, but he couldn't. So he went over to a shelf and took out the Lutheran catechism, and he found that very part there about the sacrament, and showed me, and I couldn't think any person could make himself understood better than that when he have not his power of speech. Q. So did you administer to him the rite? A. Yes; I sang to him hymns and I talked to him as I use to when I give the sacrament to any. Q. Prayed for him? A. Yes; and he seemed to understand it by his feelings were going after what I said. When I talked about his sin, he cried, and when I talked about the joy of the Gospel of the Saviour of Christ, he seemed to enjoy that. Q. You think he understood everything you said to him? A. - It seems to me he did." The witness further testified that he frequently administered the sacrament after that, and that the same was received with like understanding. The following question was asked: "Q. Well, what was your opinion as to whether or not he understood at all times what was going on? A. He understood what I had to bring him, and I didn't talk about anything else. Q. What impression did you get of the man as to his mental condition generally? A. I think he had his mind, except he couldn't talk, couldn't make himself understood. Q. Did you ever see him read, except that time he took up the catechism? A. Yes; he took the book and opened it and found that place, and just pointed to the place with his finger, and so I suppose he could see and read. Q. From your examination of the man and your dealings with him, extending over those many years, did you think the man was sane or insane? A. I think he was sane. Q. You think he had a notion of what it was to give a deed to property? A. Well, if they talked to him about business or deeds, he could understand that as when I talked to him about the communion he understood that, but I didn't talk business to him at all." In view of this very positive testimony from one who was an entirely disinterested witness, and who was in the position and required by virtue of his office to inquire

into the condition of a man's mind before he could administer the sacrament, it would seem that while the person could not talk, yet that the mind was still active. It would not require a very large amount of reasoning capacity to make a contract with one situated as was Kittel Olson at the time in question, and we are convinced that he had sufficient intelligence to make this deed.

The decision of the lower court is therefore reversed, and that court is directed to enter judgment in favor of the defendant, Julia Thompson, quieting title in her as to an undivided one-half of the land in suit.

SPALDING, J., concurs.

FISK, J., having tried the case below, took no part in this decision; HON. CHAS. A. POLLOCK, Judge of the Third judicial district, sitting in his stead.

MORGAN, J. (dissenting). I dissent from the conclusion reached on the question of fact as to the competency of Kittel Olson to make a valid deed. In my opinion the evidence conclusively shows him to have been incompetent under the rule announced in the opinion of the majority. No useful purpose will result from a discussion of the evidence on which I reach my conclusion.

(112 N. W. 1058.)

E. DELAFIELD SMITH, PLAINTIFF AND RESPONDENT, v. ELIZA A. SHOW, JESS SHOW, DANIEL P. SHOW, E. R. BRADLEY, FIRST BANK OF FLAXTON, N. D., A CORPORATION, KENMARE SECURITY BANK OF KENMARE, N. D., A CORPORATION, AND PRICE MORRIS, DEFENDANTS. E. R. BRADLEY, APPELLANT.

Opinion filed Aug. 3, 1907.

Bills and Notes — Indorsement — Constructions — Right of Action.

Appellant, who was payee in certain promissory notes which were secured by a chattel mortgage, sold and transferred such notes, together with the mortgage, and at the same time endorsed upon the back of the notes the following: "By agreement with recourse after all security has been exhausted, waiving protest. E. R. Bradley." *Held*, that such conditional indorsement obligated appellant to pay only such balance as might be due after the security has been exhausted. *Held*, further, that, until such security is exhausted, no cause of action

accrues against such endorser, and therefore that he cannot be joined with the mortgagors as a defendant in an action to foreclose such mortgage.

Appeal from District Court, Ward county; *Palda*, J.

Action by E. Delafield Smith against E. R. Bradley and others. From a judgment in plaintiff's favor, defendant Bradley appeals.

Reversed.

Turner & Wright, for appellant.

On guaranty of payment holder may proceed against guarantor alone or jointly with the principal without effort to first collect from latter. *McMurray v. Noyes*, 72 N. Y. 523, 15 L. Ed. 346; *Miller v. McLaughlin*, 104 N. W. 777; *McKee v. Needles*, 98 N. W. 618; *McKibben v. Ripley*, 95 N. W. 1046; *Huff v. Slife*, 41 N. W. 289; *Brown v. Curtis*, 2 N. Y. 225; *Blanding v. Wilsey*, 77 N. W. 508.

On guaranty of collection, remedies against principal must first be exhausted. *McMurray v. Noyes*, *supra*; *Bosman v. Akely*, 39 Mich. 710.

Unreasonable delay of prosecution of principal discharges guarantor of collection. *Craig v. Parks*, 40 N. Y. 181; *McMurray v. Noyes*, *supra*; *Northern Ins. Co. v. Wright*, 76 N. Y. 475.

Insolvency of principal is insufficient to excuse suit against principal first. *Day v. Elmore*, 4 Wis. 190; *Borden v. Gilbert*, 13 Wis. 570; *Dyer v. Gibson*, 16 Wis. 557; *French v. Marsh*, 29 Wis. 649; *Bosman v. Akeley*, 39 Mich. 710, 33 Am. Rep. 447; Rev. Codes 1905, sections 6082, 6083.

Action against guarantor of collection before the security is resorted to and exhausted is premature. *Bingham v. Mears*, 4 N. D. 437, 61 N. W. 808; *Brainerd v. Reynolds*, 36 Vt. 614; *Bouche v. Louttit*, 104 Cal. 320, 37 Pac. 902; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Cottrell v. New London Furniture Co.*, 68 N. W. 874; 20 Cyc. 1447.

Failure and neglect to enforce lien discharges the guarantor. *Roberts v. Laughlin*, 4 N. D. 167, 59 N. W. 970; *McMurray v. Noyes*, *supra*; *Crane v. Wheeler*, 50 N. W. 1033; *Dewey v. Clark*, 50 N. W. 1032; *Brandt*, Sur., sections 98, 99.

F. Baldwin, for respondent.

In case of an assignment of a note plaintiff should join mortgagee. *Prout v. Hogue*, 57 Ala. 28; *Derby v. Millgrew*, 58 Ala. 157; *Bibb v. Hawley*, 59 Ala. 403; *Nichol v. Henry*, 89 Idaho, 54; *Morgan v. Magoffin*, 5 Ky. 395; *Miller v. Henderson* 10 N. J. Eq. 320; *Jarman v. Wiswall*, 24 N. J. Eq. 267; *Western Res. Bank v. Potter*, 1 Clark Ch. 432; *Kittle v. Van Dyck*, 1 Sandf. Ch. 76; *Christie v. Herrick*, 1 Barb. Ch. 254; *Merrill v. Bichoff*, 38 N. Y. Supp. 194; *Enc. Pl. & Pr.* (Vol. 9) 481.

Misjoinder was waived by not demurring. *People v. Court*, 32 Pac. 819; *Alexander v. Ransom*, 92 N. W. 418.

FISK, J. This litigation arose in the district court of Ward county; the object of the action being to foreclose a chattel mortgage executed and delivered by the defendants Eliza, Jess and Daniel Show to the defendant Bradley, and by him sold and assigned, together with the notes secured thereby, to the First National Bank of Flaxton, said mortgage and notes having thereafter been sold and assigned to the plaintiff. At the time the defendant Bradley sold and assigned said mortgage and notes, he indorsed the notes upon the back as follows: "By agreement with recourse after all security has been exhausted, waiving protest. E. R. Bradley." The complaint prays a foreclosure of the mortgage and sale of the mortgage chattels, and for a deficiency judgment against the Shows and Bradley, should a deficiency exist after the application of the proceeds of the sale. The district court rendered judgment in plaintiff's favor as prayed for; such judgment providing for a sale of the mortgaged chattels, and, in case of a deficiency after such sale, that plaintiff have execution against the Shows for the amount of such deficiency, and, further (and this is the important provision so far as this appeal is concerned), that if the plaintiff is not able to collect the amount of such deficiency from the defendants the Shows, who, as above stated, are the mortgagors, then that plaintiff have execution against the property of the said Bradley therefor. Other provisions are contained in the judgment relative to the rights of Bradley to recover remuneration from the Shows for any sum collected from him under such judgment, but these provisions are not material to a decision of this appeal. The defendant Bradley is the sole appellant, and he asks for a trial de novo of the entire case under the provisions of section 7229, Rev. Codes 1905.

Appellant advances three reasons why the judgment appealed from should be reversed; but, as we consider his first reason decisive of the case, it will be unnecessary for us to notice his other points. His first contention is that no cause of action had accrued against the appellant, nor could any cause of action accrue against him under the contract of indorsement until all the security under the mortgage had been exhausted, and, hence, that the complaint fails to state a cause of action as against him. That this contention is sound we have no doubt whatever. His contract of indorsement of the notes in question is the measure of his liability. Under this contract, he obligated himself to pay only after all security has been exhausted. No recourse was to be had to him until after such security is first exhausted. This is plain from a reading of the indorsement. Such a contract is in effect, as contended for by appellant, "a guaranty of collection out of the mortgaged securities," and such contract imposes upon appellant the same liability as though he had merely guaranteed the collection of these notes out of the mortgaged securities. The respondent, as well as the trial court, evidently proceeded upon the erroneous theory that such contract of indorsement amounted to an unconditional guaranty of payment, as under no other theory could appellant be held liable in this action. There is, of course, a wide distinction between a guaranty of payment and one of collection, and such distinction is clearly pointed out by the court of appeals of New York in *McMurray v. Noyes*, 72 N. Y. 523, 28 Am. Rep. 180, as follows: "The fundamental distinction between a guaranty of payment and one of collection is that, in the first case, the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor without taking any step to collect of the principal debtor, and the omission or neglect to proceed against him is not (except under special circumstances) any defense to the guarantor; while, in the second case, the undertaking is that, if the demand cannot be collected by legal proceedings, the guarantor will pay, and consequently legal proceedings against the principal debtor and a failure to collect of him by those means are conditions precedent to the liability of the guarantor, and to these the law, as established by numerous decisions, attaches the further condition that due diligence be exercised by the creditor in enforcing his legal remedies against the debtor." Some courts have held that in case of a guaranty

of payment the guarantor may be sued jointly with the principal debtor or separately; but his liability does not depend upon any condition, as in the case of a guaranty of collection. In the latter case the rule, as established by the authorities, is that the liability of the guarantor is conditioned upon the exhausting by the creditor of all his remedies against the principal debtor. *McMurray v. Noyes*, *supra*; *Bosman v. Akeley*, 39 Mich. 710, 33 Am. Rep. 447. The Supreme Court of this state, in *Roberts v. Laughlin*, 4 N. D. 167, 59 N. W. 967, established the rule that the failure to first pursue the principal debtor is excused where it appears that a suit would be fruitless. To the same effect are the decisions in *Colby v. Farwell*, 51 Atl. 254, 71 N. H. 83; *Crane v. Wheeler*, 50 N. W. 1033, 48 Minn. 207. The rule has been embodied in statutory form in this state. See sections 6082-6083, Rev. Codes 1905.

Authorities are numerous holding to the effect that no cause of action accrues against the guarantor of collection until after the creditor has exhausted his remedies against the principal debtor; but we will content ourselves by a reference to only a few of them. In *Borden v. Gilbert*, 13 Wis. 670, Mr. Justice Cole, in speaking for the court, in an action similar to the case at bar, said: "The plain, obvious import of the guarantor's contract is that he will pay the debt, provided, on due diligence, it cannot be collected out of the mortgagor, or made out of the security. It is not an absolute promise to pay in the first instance. The respondent should exhaust his remedy against the mortgagor and the mortgaged property before he can call upon the guarantor to make good his contract. The former are the primary resources to which he must look for the payment of his debt. If they fail or prove inadequate then the guarantor becomes liable. It was therefore improper and erroneous to make the guarantor a party to this suit, and to take a personal judgment against him, under the allegations of the complaint." In *Dewey v. Clark*, 50 N. W. 1032, 48 Minn. 130, 31 Am. St. Rep. 623, it was said: "But, without deciding what the rule is where the mortgage security was given by the debtor directly to the creditor and not furnished by the guarantor, we think that, upon both principle and authority, it must be held that where a party holding a note secured by mortgage sells the note, guaranteeing its collection, and at the same time, and as a part of the same transaction, assigns the mortgage, thereby furnishing the purchaser the means of obtaining payment, in whole or in part, the

plain import of the guarantor's contract is that he will pay the debt, provided, on due diligence, it cannot be collected out of the debtor or out of the mortgage. Construed in the light of the facts, this must have been the understanding of the parties. A person guaranteeing such a debt, and assigning the mortgage with it, must have contemplated a collection by means of the mortgage, and that he would not be looked to until the creditor had resorted to that, if available. * * * Cases of sureties and guaranties of payment are, of course, not in point." To the same effect are the cases of *Brainard v. Reynolds*, 36 Vt. 614; *Cottrell v. New London Furniture Co.*, 68 N. W. 874, 94 Wis. 176; *Bouche v. Louttit*, 104 Cal. 230, 37 Pac. 902. In the latter case it was held that the action was prematurely brought, for the reason that the guaranty was to pay the deficiency, and there was none until the foreclosure sale, which took place subsequent to the commencement of the action. Likewise, in the *Wisconsin* case last above cited, it was held, for similar reasons, that the guarantors of the collection of the debt were not proper parties to an action to foreclose the mortgage. See, also, 20 Cyc. 1447, 1448, and cases cited.

It goes without saying that a person cannot be rightfully sued until a cause of action accrues against him, and, applying this elementary principle to the case at bar, it necessarily follows that the complaint fails to state a cause of action against appellant, because, at the time the action was commenced against him, no attempt had been made by plaintiff to exhaust the security covered by the mortgage. The argument of respondent's counsel that appellant did not challenge the sufficiency of the complaint in the court below has no force, as it is well settled that this may be done in the Supreme Court for the first time. Nor is it any answer to appellant's contention that the rights of appellant were safeguarded by the judgment. No cause of action existed against him at the time the action was brought, his liability being a mere contingent liability, and, such contingency not having arisen, no action could be commenced nor judgment recovered against him. As aptly stated by appellant's counsel: "Reduced to its last analysis, the plaintiff's case, as disclosed by the complaint and the judgment, is in this situation: At the commencement of this action the plaintiff held the appellant's contract, by which the latter had assumed a liability contingent upon the happening of a certain event, to wit, the sale of the mortgaged property, and the insufficiency of the

proceeds to satisfy the mortgage debt. Without the happening of such contingency, the plaintiff commenced this action against the principal debtor and the guarantor, and prosecuted it to judgment. At the time of giving judgment the contingency had not yet accrued. The court says, in effect: "There is nothing due upon this contract now. The plaintiff has not exhausted the security, and, when he does, there may be no deficiency for the defendant to pay. But, since the parties are in court, I will direct the sheriff to perform plaintiff's contract for him, to wit, to diligently pursue and exhaust the security and in conjunction with the plaintiff, who has entire control over the execution, to determine when that has been done, and whether a deficiency remains for the defendant to pay. I will constitute the plaintiff the judge of all further proceedings in this case, and, when he and the sheriff are satisfied that they have performed the conditions precedent to this contract, if they are then of opinion that the guarantor is indebted to plaintiff, the latter may, at his own instance, and without any application to the court, have a general execution against the guarantor. If, then, the guarantor is not satisfied with the decision of the plaintiff and the sheriff, he may, by such appropriate proceedings as the law gives him, if any are provided, bring the matter before the courts for review.' Is it not clear that the guarantor cannot by any possible process of reasoning be considered a proper party to this suit? To adjudge his rights, the court must not only determine whether the plaintiff has exhausted the security, and whether a deficiency remains, but it must further say whether he has pursued his remedies against the securities with due diligence and in good faith. Necessarily this cannot be done where the guarantor is sued before the security is resorted to, and it is left for the plaintiff after the decree to perform those conditions precedent to this contract."

It follows that the judgment appealed from, in so far as the appellant is concerned, must be reversed and the action dismissed; and it is so ordered, with costs to appellant. All concur.

112 N. W. 1062.

CITY OF GRAFTON, A CORPORATION, v. ST. PAUL, MINNEAPOLIS AND
MANITOBA RAILWAY COMPANY, A CORPORATION, AND GREAT
NORTHERN RAILWAY COMPANY, A CORPORATION.

Opinion filed Aug. 9, 1907. Rehearing denied Oct. 26, 1907.

**Municipal Corporation — Laying out Streets — Power to Determine the
Necessity of Improvements.**

1. In an action by a municipality to condemn property for street purposes, it is unnecessary to allege or prove the public necessity for such street. The power to determine this question has been expressly delegated to the legislative department of such municipalities, and its determination is conclusive. The only question of necessity for the court to determine is as to whether the particular property sought to be condemned is necessary for such public use.

Same — Municipal Ordinance — Evidence.

2. The city council of respondent city passed an ordinance declaring it necessary to extend one of its streets across appellant's right of way in such city, and it is held that such ordinance was properly received in evidence; the same being competent for the purpose of proving the official determination by the council of the necessity for the crossing.

Same — Damages.

3. In such action the railway companies are not entitled to recover damages for structural changes, such as grading, approaches, plank-ing crossing, etc., made necessary by the opening of such street; the duty of making such changes being required by statute enacted under the police power of the state. Section 14, art. 1, of the Constitution of this state, which provides that "private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner," does not require the allowance of such items of damage.

The rule for determining damages in such cases is that the railroad company shall be compensated for the diminution in value of its exclusive right to the use, for railway purposes, of the property sought to be condemned, caused by the existence and use of the street.

Evidence — Ordinance.

4. An ordinance may be proved as to its contents as well as to its passage by the council, by the introduction in evidence of the original record of such ordinance properly identified as such.

Eminent Domain — Pleading.

5. Under section 7592, Rev. Codes 1905, the complaint in such action need not allege the public necessity for the crossing sought to be opened.

Appeal from District Court, Walsh county; *Kneeshaw*, J.

Action by the city of Grafton against the St. Paul, Minneapolis & Manitoba Railway Company and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Murphy & Duggan, for appellants.

The necessity of condemnation is determined by the courts. *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570.

Compensation must be made for grading and planking required by the improvement. *State v. Shardlow*, 46 N. W. 74; *In re Opening First St.*, 26 N. W. 159; *State v. District Court*, 44 N. W. 7; *Chicago Ry. Co. v. Hough*, 28 N. W. 532; *In re City Grand Rapids v. Grand Rapids Ry. Co.*, 33 N. W. 15; *Commissioners of Parks v. Michigan Cent. Ry. Co.*, 51 N. W. 447 and 934; *Commissioners of Parks v. Detroit, etc., Ry. Co.*, 52 N. W. 1083; *City of Grand Rapids v. Bennett*, 64 N. W. 585; *People v. Lake Shore Ry. Co.*, 17 N. W. 841; *Village of Plymouth v. Pere Marquette Ry. Co.*, 102 N. W. 947.

Gray & Casey, for respondents.

The necessity for a public improvement is a political, not a judicial question. *Los Angeles v. Waldron*, 3 P. 890; 1 Pac. 883; *Ill. Cen. R. Co. v. City of Chicago*, 30 N. E. 1044; *Ill. Cent. Ry. Co. v. City of Chicago*, 28 N. E. 740; *Chicago & N. W. Ry. Co. v. City of Chicago*, 29 N. E. 1109; *Chicago & N. W. Ry. Co. v. City of Morrison*, 63 N. E. 96; *Chicago & N. W. Ry. Co. v. Chicago*, 37 N. E. 842; *Pittsburg, etc., Ry. Co. v. Sanitary Dist.*, 75 N. E. 892; *Lynch v. Forbes*, 37 N. E. 437; *Bennett v. City of Marion*, 76 N. W. 844; *Barrett v. Kemp*, 59 N. W. 76; *Knoblauch v. City of Minneapolis*, 57 N. W. 928; *Fairchild v. City of St. Paul*, 49 N. W. 325; *Warner v. Town of Gunnison*, 31 Pac. 238.

The measure of damage is without reference to expenditures to comply with police regulations in regard to street crossings. *Chicago & N. W. Ry. Co. v. City of Chicago*, 29 N. E. 1109; *Chicago & N. W. Ry. Co. v. Cicero*, 41 N. E. 640; *Illinois Cent. Ry. Co. v. City of Chicago*, 48 N. E. 492; *Illinois Cent. Ry. Co. v. Town of Normal*, 51 N. E. 781; *Chicago, B. & Q. Ry. Co. v. Chicago*, 37 N. E. 78; *Chicago & A. R. Co. v. City of Pontiac*, 48 N.

E. 485; *City of Albia v. C. B. & Q. Ry. Co.*, 71 N. W. 541; *People v. B. & A. Ry. Co.*, 70 N. Y. 569; *Albany N. R. Co. v. Brownell*, 24 N. Y. 325.

City ordinance book, properly identified, is *prima facie* evidence of the existence of the ordinance. 17 Cyc. 298; *Metropolitan St. R. Co. v. Johnson*, 16 S. E. 49; *Mayer v. Swink*, 16 S. W. 76; *Eichenlaub v. City of St. Joseph*, 21 S. W. 8; *Merced Co. v. Fleming*, 43 Pac. 392; *San Diego v. Siefert*, 32 Pac. 644; *Linsay v. City of Chicago*, 3 N. E. 443; *Prell v. McDonald*, 7 Kan. 426.

Plaintiff's complaint was sufficient. *City of Lidgerwood v. Michalek*, 12 N. D. 348, 97 N. W. 541; *Cal. Southern Ry. Co. v. Southern Pac.*, 7 Pac. 123; *City of Los Angeles v. Waldron*, 3 Pac. 890.

FISK, J. The respondent, the city of Grafton, brought this action against the appellant in the district court of Walsh county; the object being to condemn for street purposes a certain strip of land across appellants' right of way within the corporate limits of respondent city. After plaintiff rested its case in chief, defendants moved for a dismissal of the action upon the ground that plaintiff had totally failed to show any public necessity for condemning the property in question, which motion was denied. And at the close of all the testimony they moved for a dismissal of the action upon the same ground, which motion was denied; the court holding that plaintiff was entitled to have said property condemned as prayed for. Thereupon the trial court, on motion of the plaintiff, directed the jury to return a verdict in defendants' favor for nominal damages merely, and from an order denying defendants' motion for a new trial this appeal is taken.

The defendants, by their answer, attempt to put in issue the question of the necessity for the opening of said street across such right of way. They also allege that the damage which they will suffer by the opening of such street will be the sum of \$500, and that the property sought to be condemned is of the value of \$500. Plaintiff introduced in evidence a plat of that portion of the city of Grafton surrounding the point of the proposed crossing. It also introduced a record of an ordinance passed by its city council prior to the commencement of the action, purporting to open Fourth street in said city across defendants' right of way, being the crossing sought to be condemned. Numerous errors are alleged

by appellants as grounds for a reversal of the order appealed from, but they relate principally to the questions of the necessity for the opening of said street crossing and to the damages to which defendants are entitled in case the street is opened. Appellants assert that there is no sufficient evidence in the case to establish that any necessity exists for the condemnation of the property in question. Appellant's contention, in brief, is that the power to determine the necessity for taking property under the eminent domain statute is in all cases vested in the courts, and that the action of the city council in passing the ordinance above mentioned was incompetent to prove the issue as to the necessity for the taking of the property sought to be condemned. It is respondent's contention that the power of determining the necessity for opening, laying out, and extending streets and alleys within a municipality has been expressly delegated by laws to municipalities, and that "when a city or town decides for itself—as it may do—that a street is desirable it is not bound to prove that such street is necessary, but only that the taking of the property it seeks to condemn is necessary for laying out or extending such street or alley. That when it shows that the use to which the property is to be adapted is a public use, the inquiry on such point is closed." And it relies upon subdivision 3, section 7575, and subdivision 68, section 2678, Rev. Codes 1905. We are convinced that the question of the expediency or public necessity for extending this street across defendants' right of way was a question exclusively for the city council to determine, and that its determination is conclusive. It is, of course, an entirely different question as to whether the property sought to be condemned is necessary for the purpose of extending such street. This question is one exclusively for the court to determine in the condemnation proceedings.

If the distinction between the necessity for the exercise of the power and the necessity for the taking of the specific property sought to be condemned is kept in mind, but little difficulty will be encountered in properly understanding the correct rules as enunciated by the authorities. The former question is usually a political or legislative question, while the latter is always a judicial question, or one in which the person's or corporation's decision is subject to review by the courts. Our statute on eminent domain, being chapter 36 of the Code of Civil Procedure (Rev. Codes 1905), is very similar in its provisions to those found in the

Code of Civil Procedure of California, and was, no doubt, borrowed from that state. The Supreme Court of California construed such statute in *City of Pasadena v. Stimson*, 27 Pac. 604, 91 Cal. 238, and the construction contended for by respondent was adopted. We quote: "The legislature has defined the public uses for which private property may be taken, and, among others, 'sewerage of any incorporated city * * * or of any village or town.' * * * When a city or town decides for itself, as it may do, that a sewer is desirable, it is not bound to prove that such sewer is necessary, but only that the taking of the property it seeks to condemn is necessary for the construction of the sewer. When it shows that the use to which the property is to be applied is a public use (and that is shown by the statute in this case), the inquiry on that head is closed." Again, in *Los Angeles v. Waldron*, 3 Pac. 890, 65 Cal. 283, that court, in speaking upon the question under consideration here, took occasion to say: "In a proceeding to condemn property for the use of a city, it is not necessary to allege that the property sought to be condemned was necessary for some municipal or public use. The question of the necessity existing at the time of the passage of an ordinance therefore was for the council to determine, and its determination is made manifest by the passage of the ordinance." See, also, *City of Los Angeles v. Waldron* (Cal.) 1 Pac. 883, and *San Francisco Ry. Co. v. Leviston*, 66 Pac. 473, 134 Cal. 412; *Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224.

Counsel for appellants cite and rely upon *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570. In that case, Judge Corliss, in writing the opinion, used some language which might be construed, when standing alone, as supporting appellants' contention. He said: "In this state the legislature has seen fit to take it out of the power of any person or corporation to settle the question of necessity, and to trust the determination of that issue to the judicial branch of the government." This broad statement of the rule was no doubt correct, as applied to that case, which was an action by a railway company to condemn certain property for the purpose of changing the course of a stream; but it is not applicable to a case such as the one at bar, where a municipality seeks to extend a street across a railroad right of way. In the case cited, the decision was based upon section 5959, Rev. Codes 1895, which is identical with section 1241 of the Code of Civil Procedure of California. The decision might well have been placed upon the provisions of section

4266 of our Civil Code (1905), which enumerates the powers of railway companies, subdivision 3 of which provides, in effect, that such corporations may acquire under the chapter on Eminent Domain such property only as may be necessary for the construction, maintenance, and operation of its railroad, etc. The legislature has seen fit to extend to these quasi public corporations the power thus restricted of condemning private property for its use. Hence it is proper to hold that, before such a corporation can take the property of another and subject it to its use, the company must prove the necessity for such taking. But in the case of public corporations widely different powers in this respect have been delegated. We think it is clear that specific authority to exercise the right sought to be exercised by respondent in this case was expressly delegated without restriction to the city council of each city in the state by subdivision 68, section 2678, Rev. Codes 1905, relating to the powers of city councils, which is as follows: "To extend by condemnation or otherwise, any street, alley or highway, over or across * * * any railroad track, right of way or land of any railroad company within the corporate limits." When this subdivision is construed with subdivisions 7, 25, 26 and 27 of the same section, it is apparent that the city council had express authority to pass the ordinance in question. Subdivisions 7 and 68, supra, were, no doubt, borrowed from the statutes of Illinois, and the same have repeatedly been construed by the Supreme Court of that state as giving to the city council express authority to extend streets over railroad rights of way by condemnation or otherwise. *Illinois Central R. R. Co. v. City of Chicago*, 30 N. E. 1044, 141 Ill. 586, 17 L. R. A. 530; *Illinois Central R. R. Co. v. City of Chicago*, 28 N. E. 740, 138 Ill. 453; *Chicago & Northwestern Ry. Co. v. City of Chicago*, 29 N. E. 1109, 140 Ill. 309; *Chicago & Northwestern Ry. Co. v. City of Morrison*, 63 N. E. 96, 195 Ill. 271; *Chicago & Northwestern Ry. Co. v. City of Chicago*, 37 N. E. 842, 151 Ill. 348. These cases were decided under a constitutional provision regulating the exercise of the right of eminent domain identically the same as that of this state. We do not, however, rest our decision on this branch of the case upon the authorities above cited, but the great weight of authority in other jurisdictions sustains the rule above announced. See 15 Cyc. 629-631; 2 Dill. Mun. Corp., section 600; Lewis, Em. Domain (2d Ed.) sections 238, 239, 393; 7 Am. & Eng. Enc. Pl. & Pr. 474; *Town of Poulan v. Rail-*

way Co., 51 S. E. 657, 123 Ga. 605; Pittsburg, etc., Ry. Co. v. Sanitary Dist., 75 N. E. 892, 2 L. R. A. (N. S.) 226; Lynch v. Forbes, 37 N. E. 437, 161 Mass. 302, 42 Am. St. Rep. 402; Bennett v. City of Marion, 76 N. W. 844, 106 Iowa, 628; Barrett v. Kemp, 59 N. W. 76, 91 Iowa, 296; Knoblauch v. City of Mpls., 56 Minn. 321, 57 N. W. 928; Fairchild v. City of St. Paul, 49 N. W. 325, 46 Minn. 540; Warner v. Town of Gunnison, 31 Pac. 238, 2 Col. App. 430; St. Louis, etc., R. R. Co. v. City of Fayetteville, 87 S. W. 1174, 75 Ark. 534; People v. McClellan, 94 N. Y. Supp. 1107, 107 App. Div. 272; Richland Sch. Tp. v. Overmyer, 73 N. E. 811, 164 Ind. 382. We conclude therefore that the trial court did not err in holding that there was no question as to the public necessity for such crossing to be submitted to the jury or to be determined by the court, as the city council, by the passage of the ordinance in evidence, conclusively settled that point, and the court had no right to inquire into such question. Appellants' objection to the proof of this ordinance was clearly untenable, and was therefore properly overruled. It was competent for the purpose of proving that the city council, in whom, as we have seen, was vested the express power of determining the question of public necessity, had officially decided such question. Of course, the council could not by the passage of such ordinance open the crossing in question before the same was properly condemned, but, as before stated, the ordinance was properly admitted for the purpose of proving the fact that the council deemed such crossing necessary for the public convenience and welfare, and this was the purpose sought to be accomplished by its introduction.

We come now to the question of the damages to which defendants are entitled. The trial court held that they were entitled to nominal damages merely, but appellants insist that under section 14 of the constitution of this state they are entitled to "just compensation," and they argue with much force that this means such sum as will fully compensate them for all the detriment to be suffered by them on account of the easement sought to be taken. They do not ask to recover, except for such amount as will reimburse them for the expenditures which will necessary be required to be made by them on account of structural changes, such as grading, planking, building sidewalks, etc. Respondent does not dispute the fact that such expenditures will become necessary by the opening of such crossing, but its contention is that such ex-

penditures are made necessary by a statute of this state, enacted under the so-called police power of the state, and therefore that they cannot be considered a proper element of damage in this action. The question has never, to our knowledge, been presented before in this state, but has frequently been passed upon by the courts of last resort in sister states, and has also been decided by the Supreme Court of the United States. The courts are divided in their holdings, some sustaining appellants' contention, while others hold to a contrary view. Among the courts first mentioned are those of the states of Minnesota, Michigan, Massachusetts, Kentucky, Maryland and Kansas, as may be seen by the following cases: *State ex rel. C., M. & St. P. R. Co. v. Shardlow et al.*, 46 N. W. 76, 43 Minn. 524; *State ex rel. St. P., Mpls. & Man. R. R. Co. v. Dist. Court*, 44 N. W. 7, 42 Minn. 247, 7 L. R. A. 121; *In re opening First St.*, 58 Mich. 641, 26 N. W. 159; *Chicago Ry. Co. v. Hough*, 28 N. W. 532, 61 Mich. 507; *In re City of Grand Rapids v. Grand Rapids Ry. Co.*, 33 N. W. 15, 66 Mich. 42; *Commissioners of Parks v. Mich. Cent. Ry. Co.*, 90 Mich. 385, 51 N. W. 447; *Commissioners of Parks v. Detroit, etc., Ry. Co.*, 93 Mich. 58, 52 N. W. 1083; *City of Grand Rapids v. Bennett*, 106 Mich. 528, 64 N. W. 585; *Old Colony Ry. Co. v. County of Plymouth*, 80 Mass. 154; *Boston & Albany R. Co. v. Cambridge*, 159 Mass. 283, 34 N. E. 382; *Shirley v. Southern Ry. Co.*, 89 S. W. 124, 28 Ky. Law Rep. 154; *City of Baltimore v. Cowan et al.*, 41 Atl. 900, 88 Md. 447, 71 Am. St. Rep. 433; *Kansas City v. Ry. Co.*, 14 S. W. 808, 102 Mo. 633, 10 L. R. A. 851; *Kansas Cent. Ry. Co. v. Board of Co. Commissioners*, 45 Kan. 716, 26 Pac. 394; *Southern Ry. Co. v. Commissioners*, 52 Kan. 138, 34 Pac. 396. The Supreme Court of New Jersey formerly held the same way. *State v. Mayor*, 17 Atl. 971, 51 N. J. Law, 428; *Morris Canal v. State*, 24 N. J. Law, 62. But in the late case of *Morris & E. Ry. Co. v. City of Orange*, 43 Atl. 730, 63 N. J. Law, 252, this court departed from the rule established by its prior decisions.

In our opinion the better rule, and the one we shall adopt, is that the railroad company should be compensated for the diminution in value of its exclusive right to the use for railway purposes of the property sought to be condemned, caused by the use of the same by the public for a street crossing, and that the items proved by appellants for grading, planking and constructing sidewalks at such crossing are not proper elements of damage. The

trial court, in view of the state of the record, there being no proof relating to the proper measure of damages, correctly instructed the jury to return a verdict for nominal damages merely. We are supported in our views by what we consider the weight of authority, and the best considered cases. Among the cases holding to this rule are the following: *C., M. & St. P. Ry. Co. v. Milwaukee*, 72 N. W. 1118, 97 Wis. 418; *Morris & E. Ry. Co. v. City of Orange*, 43 Atl. 730, 63 N. J. Law, 252; *Chicago & N. W. Ry. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *C. & N. W. Ry. Co. v. Cicero*, 41 N. E. 640, 157 Ill. 48; *Ill. Cent. Ry. Co. v. Chicago*, 48 N. E. 492, 169 Ill. 329; *Ill. Cent. Ry. Co. v. Normal*, 51 N. E. 781, 175 Ill. 562; *C., B. & Q. Ry. Co. v. Chicago*, 37 N. E. 78, 149 Ill. 457; *s. c.*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; *C. & A. R. Co. v. Pontiac*, 48 N. E. 485, 169 Ill. 155; *City of Albia v. C., B. & Q. Ry. Co.*, 71 N. W. 541, 102 Iowa, 624; *Railway Co. v. Sharp*, 38 Ohio St. 150; *People v. B. & A. Ry. Co.*, 70 N. Y. 569; *Railroad Co. v. Brownell*, 24 N. Y. 345; *Boston, etc., Ry. Co. v. Greenbush*, 52 N. Y. 510; *Canal Co. v. Village of Whitehall*, 90 N. Y. 21; *Portland, etc., Ry. Co. v. Deering*, 2 Atl. 670, 78 Me. 61, 57 Am. Rep. 784; *St. Louis, etc., R. R. Co. v. City of Fayetteville (Ark.)* 87 S. W. 1174; *Boston & M. Ry. Co. v. York*, 10 Atl. 113, 79 Me. 386; *N. Y. & N. E. Ry. Co. v. Waterbury*, 22 Atl. 439, 60 Conn. 439. See, also, 15 Cyc. 696, and cases cited. An examination of the foregoing cases will disclose, we think, that the conflict in the holdings of these courts is mainly due to the difference in the statutes of the respective states, but some of them are based upon the decisions in Massachusetts, in which state there are express statutory provisions requiring compensation for these structural changes. Cases decided upon a statute such as the one in Massachusetts cannot possibly have any weight in construing a statute so widely different as the one in this state. The courts of Kansas, Minnesota and Missouri have apparently followed the rule adopted in Massachusetts as enunciated in *Old Colony Ry. Co. v. Plymouth County*, *supra*, but a mere cursory examination of the constitution and statute under which this case was decided will conclusively demonstrate that the same is not in point under a constitution and statutes like those in this state, and in the states last mentioned. The precise question here involved was up for consideration in the Illinois cases above cited, and the Supreme Court of that state, as well as the United States Supreme Court,

under a statute identically the same as our own, held that no damages could be allowed for structural changes made necessary by such crossing, and they also held, for reasons which appeal to us as clearly sound and unanswerable, that such expenditures are made necessary in order to comply with the express statutory enactments aforesaid, which are construed as mere police regulations. As stated by the Supreme Court of the United States in *C., B. & Q. Ry. Co. v. Chicago*, *supra*: "The expense of erecting gates, planking the crossings, and maintaining flagmen, which will necessarily result in the laying out of a street across a railroad, must be regarded as incidental to the exercise of the police powers of the state, and do not constitute an element of just compensation to the railroad." The sections of our Code above referred to are 4320-4322, Rev. Codes 1905; also, section 2678, subdivisions 26, 27. We therefore hold that appellants' assignments of error, which are predicated upon the rule of damages adopted by the trial court, must be overruled.

It is next contended by appellants that the trial court committed reversible error in receiving in evidence the ordinance aforesaid; their point being that no sufficient foundation was laid for its introduction by proof of its passage by the city council. They contend that the only proper method of proving the same was by the production of the journal of the proceedings of the council showing the steps leading up to and the vote upon its final passage, citing *Pickton v. City of Fargo*, 10 N. D. 469, 88 N. W. 90. This contention is clearly unsound. The case cited is not in point. All that was decided in that case was that the law requiring a ye and nay vote in the passage of ordinances is mandatory, and that the minutes of the proceedings of the council must show a compliance therewith, and that parol evidence is inadmissible for such purpose. The method of proving an ordinance was not otherwise involved in the decision of that case. We think the evidence sufficient to prove, *prima facie*, not only the contents and provisions of the ordinance, but that the same was regularly passed. This proof was sufficient under the express provisions of our Code. See sections 2675, 7317, subdivision 15 of section 7298, and subdivision 5 of section 7300, Rev. Codes 1905. It was also admissible in the absence of such statutory provisions. 17 Cyc. 298; *Dill. on Mun. Corp.* (4th Ed.) section 422; *Metropolitan St. R. Co. v. Johnson*, 16 S. E. 49, 90 Ga. 500; *Mayer v. Swink*, 16

S. W. 76, 90 Tenn. 152; *Eichenlaub v. City*, 21 S. W. 8, 113 Mo. 395; 18 L. R. A. 590; *Merced Co. v. Fleming*, 43 Pac. 392, 111 Cal. 46; *San Diego v. Siefert*, 32 Pac. 644, 97 Cal. 594; *Linsay v. City of Chicago*, 3 N. E. 443, 115 Ill. 120; *Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423.

Appellants' fifth point calls in question the sufficiency of the complaint; the particular claim being that the same does not properly allege a necessity for the taking of the property sought to be condemned. A complete answer to this contention may be found in the opinion in *City of Lidgerwood v. Michalek*, 12 N. D. 348, 97 N. W. 541, wherein the court, in construing section 7592 of our Code, sustained a complaint similar to the one in the case at bar. The Supreme Court of California, under a statute identically the same as our own, has held likewise. See *City of Los Angeles v. Waldron*, 3 Pac. 890, 65 Cal. 283.

The remaining points argued by appellants' counsel are, we think, already sufficiently answered adversely to their contention by what we have heretofore said.

We therefore conclude that the order appealed from was correct, and should be affirmed. All concur.

(113 N. D. 598.)

BOYD VAN GORDON v. FRANK GOLDAMER AND L. D. BAIRD.

Opinion filed Oct. 14, 1907.

Chattel Mortgage — Waiver of Lien.

1. From the voluminous evidence in the case, which would be of no general interest to the legal profession or to the public, it is found that defendant Baird waived his rights as holder of a lien on chattels belonging to the plaintiff in favor of certain third parties, who took security on the same chattels, in consideration of such third parties making advances and extensions necessary to enable the plaintiff to carry out the terms of the contract with defendant Baird for the cropping of lands belonging to him during the season of 1905.

Same — Knowledge of Waiver.

2. The defendant Goldamer purchased lands from the defendant Baird before the crop of 1905 was fully secured, and with it the indebtedness of plaintiff to Baird, secured by the lien above referred to. *Held*, that the evidence establishes the fact that at the time of such purchase the defendant Goldamer had both notice and knowledge of such waiver by Baird, and that the security held by Baird was inferior to that held by the third parties.

Same — Lien and Priority — Mortgagor's Duty in Application of Security.

3. The plaintiff, who had induced third parties to make him advances to enable him to comply with the terms of the farm contract by means of which he raised a crop during 1905, and for which he had given them security, which is held to be prior to that held by the landlord on the crop raised, not only has an interest in the lawful application of the proceeds of such crop to his indebtedness, but it is his duty to secure if possible, such application in the order of priority of the security afforded by liens upon such crop when the total proceeds are insufficient to pay all lienholders in full.

Appeal — Parties — Marshaling of Securities — Objections Raised Below.

4. The mortgagor is a proper party plaintiff in a suit to secure application of the proceeds derived from the security for debts secured by the various liens in the order of their priority; and, conceding that a part of the lienholders might properly have been joined as plaintiff, or might have maintained independent actions to secure their rights, it is too late for defendants to first object in the Supreme Court to their non-joinder as plaintiffs.

Stipulations — Binding Effect — Rights of Third Parties.

5. This court is not bound by stipulation of the parties of record to an action wherein it is agreed that the trial court committed error in appellant's brief, and requesting this court to reverse the judgment of the lower court and enter judgment in favor of the appellants, and will not, under the circumstances disclosed by the record and stipulation in this case comply with the terms of such a stipulation, especially when the record discloses no reversible error on the part of the trial court, and interested third parties, with the knowledge of both plaintiff and defendant, have participated in and contributed toward the conduct of the litigation from its inception.

Attorney and Client — Ratification.

6. This suit was brought in the name of one Van Gordon as plaintiff, expenses being paid by holders of the liens upon the property in controversy, which liens, if the plaintiff prevailed, would be prior and superior to the liens of the defendants. Van Gordon appeared through an attorney, and was examined as a witness in his own behalf at great length on the trial, and testified that he was the plaintiff, and such testimony was not denied or questioned by either party until the record and briefs had been printed and the case set for argument in the Supreme Court, when the plaintiff filed an affidavit alleging that he had never employed the attorney of record for plaintiff to bring this action. *Held* that, even though the attorney claiming to represent the plaintiff had acted without direct authority in bringing suit, plaintiff had ratified his acts and made him his attor-

ney, and that it is too late for plaintiff to deny such employment, or for the defendants to question the attorney's authority for the first time by stipulation and motion to reverse the judgment of the trial court, when set for argument in the Supreme Court.

Appeal from District Court, Nelson county; *Fisk, J.*

Action by Boyd Van Gordon against Frank Goldamer and L. D. Baird. Judgment for plaintiff. Defendants appeal.

Affirmed.

Frich & Kelly and *Bangs, Cooley & Hamilton*, for appellants.

Proof upon which the reformation of an instrument is sought must be clear and convincing. *Merchant v. Pielke*, 9 N. D. 182, 82 N. W. 878; *Benson v. Markoe*, 37 Minn. 30; *Clute v. Frazier*, 12 N. W. 327; *Jasper v. Hazen*, 4 N. D. 1; 2 Pom. Jur., section 859.

One seeking to reform a contract must act properly. *Sharpe v. Behr*, 117 Fed. 864, 868; *Citizens Nat. Bank v. Judy*, 43 N. E. 259; *Barfield v. Price*, 40 Cal. 535.

Possession may charge notice of possessor's rights, but not of those of third persons. *Wright v. Levy*, 12 Cal. 257; *Porter v. King*, 1 Fed. 755.

Assignee of a chose in action taken subject to all defenses, but he is not bound by a parol agreement not known to him, made with a stranger to the contract intended to destroy the legal effect of the record. *Williams v. Donnelly*, 74 N. W. 601; *Murray v. Laybourne*, 2 Johns. Ch. 441; *Heinrod v. Bolton*, 44 Ill. App. 516; *Bloom v. Henderson*, 8 Mich. 395; *Bailey v. Greenleaf*, 7 Wheat. 46; *Norton v. Rose*, 2 Wash. 233.

Scott Rex, for respondent.

Reformation for mutual mistake, or mistake of one coupled with the fraud of the other party to the contract, will be had. *Klatt v. Dummert*, 73 N. W. 404; *Carpenter Paper Co. v. Wilcox*, 70 N. W. 228; *Silbar v. Ryder*, 23 N. W. 106; *Littlejohn v. Creamery Co.*, 85 N. W. 588, 24 Enc. Law, 655; *Merchant v. Pielke*, 9 N. D. 182, 82 N. W. 878; *McCormick Harvesting Co. v. Woulph*, 76 N. W. 939; *Welles v. Yates*, 44 N. Y. 525.

Open, notorious possession is notice. *Dickson v. Dows*, 92 N. W. 798; 23 Enc. Law, 500; *Leebrick v. Stahle*, 27 N. W. 490; *Sheerer v. Cuddy*, 24 Pac. 713.

Question of waiver is a branch of the doctrine of quasi estoppel. 16 Cyc. 784; *Fowler v. Parsons*, 9 N. E. 799.

SPALDING, J. This action was commenced for the reformation of a contract under which the plaintiff farmed a large amount of land in Nelson county, during the years 1903, 1904 and 1905, belonging to the defendant Baird, but now owned by the defendant Goldamer. Plaintiff also asked for the appointment of a receiver to take charge of the 1905 crop. It was asked that the contract be reformed by striking out certain portion by which title to the whole crop raised was retained by the owner of the land until a division thereof and as security for all advances and indebtedness of the tenant to the landlord.

It was contended by the plaintiff that this provision had been inadvertently inserted in the contract, without knowledge, of either the landlord or the tenant, by reason of a blank having been used in which this was printed in fine type. The defendants deny that it was inserted by mistake, and the trial court declined to reform the contract. We are satisfied that the court was correct in this; but we shall not consider the matter, because the conclusion which we have arrived at on another phase of the case render it unnecessary. It is immaterial whether the landlord retained title to all the crop or not. Two questions of fact and one of law are raised on the appeal, viz.: Did the defendant Baird waive his right as owner or holder of a lien on the crop raised by respondent in 1905, either by agreement or by his acts? If he did either, did defendant Goldamer have knowledge or notice of such waiver when he purchased the debt due from the respondent to Baird? And had plaintiff, Van Gordon, such an interest in the subject of the controversy that he can maintain the action?

The plaintiff cropped the land under this contract during the seasons of 1903 and 1904; his share of the crop raised being three-fourths, and that of the landlord the remaining one-fourth. The defendant Baird, as landlord, made advances to the plaintiff in a large amount, and in the fall of 1904 went to Lakota from his home in Austin, Minn., and there had various interviews with the plaintiff and other creditors of the plaintiff. At that time Van Gordon was hopelessly insolvent. All his property, stock and machinery were covered by a large number of mortgages. First in the order of priority was a chattel mortgage on his horses and

machinery, securing a past-due indebtedness of upwards of \$4,000, held by a former owner of the farm, named Thal. The defendant Baird held a chattel mortgage on the same property, subject to the Thal mortgage. Other creditors, including A. J. Gronna, Scott & Barrett Mercantile Company, and the defendant Goldamer, held other subsequent liens on various portions of the property. Thal was insisting on full payment of her indebtedness and was threatening to foreclose her mortgage. The effect of such foreclosure would have been to totally disable the plaintiff from carrying on the farm during the season of 1905, and would have rendered appellant Baird's security worthless and left him with no tenant. During this visit to Lakota the financial condition of the plaintiff was discussed by him and Baird, with a view to making some arrangement whereby he could continue his farming operations during the season of 1905. Baird was unwilling or unable to furnish the funds necessary to provide for this, but admits that he offered to waive his right to priority of security in favor of Gronna if the plaintiff could induce him to take care of the Thal indebtedness and furnish money and supplies needed to enable him to continue his farming operations during the following season, and permit Gronna to take security which would be superior to that held by him. He claims that this offer was not accepted. On the other hand, the respondent claims that it was made known to Mr. Gronna, and discussed between them, and was accepted and acted upon by Gronna and other creditors, including the appellant Goldamer. The testimony of the respondent is corroborated by other witnesses, and the subsequent acts of the parties concerned are also very strongly corroborative of the respondent.

The appellants urge that if any agreement was made, it was only to apply to Gronna, Scott & Barrett Mercantile Company, the defendant Goldamer, and Jorgenson Bros.; but, be this as it may, the proposition was made with reference to means to carry on the farm and raise a crop in 1905, rather than with reference to the persons who should furnish the means, and it was immaterial whether Gronna furnished all the supplies and money, or only part of them, and persuaded some one else to furnish the rest. This agreement was executed by these various parties furnishing supplies and doing things necessary to enable the respondent to continue his farming operations. It was decided that it would

be better policy to permit the completion of the foreclosure of the Thal mortgage, which had commenced, than to take it up, and accordingly the security was sold under the foreclosure proceedings, and Gronna purchased most of it, all that respondent could make use of to advantage, and turned it over to the respondent, taking a new first mortgage on it and on the crops on certain tracts of land as security for the purchase price, and for advances either in money or supplies which he furnished respondent. Advances were made and supplies furnished by the other parties named from time to time, and chattel mortgages taken on separate portions of the crop to be raised. For the purpose of permitting these arrangements to be carried out, the appellant delayed taking security for the indebtedness due him until the 22d of July, 1905, after these other creditors had been secured. Respondent then gave Baird chattel mortgage security, subject to the liens of the others named. It is claimed by respondent that the agreement, and the subsequent conduct of the parties pursuant thereto, constituted a waiver by appellant Baird of his right to priority of security on plaintiff's share of the 1905 crop under the contract in question. The trial court so held. In this we think it was justified. A contract to retain the title to all of the crop covered by the contract was lawful, and except for some subsequent agreement the landlord would retain title until all the conditions of the contract were complied with. *Angell v. Eger*, 6 N. D. 391, 71 N. W. 547.

The appellant would have retained title to all the crop under his contract with the respondent, but for this agreement of waiver, and it is clear to us, by what we consider a great preponderance of the evidence, that there was such an agreement. That the lien of a mortgage may be waived by the mortgagee cannot be questioned, and such lien may be waived by parol. *Stone v. Fairbanks*, 53 Vt. 145; 25 Cyc. 673. And it may be impliedly waived by conduct of the lienholder inconsistent with the existence of a lien. 25 Cyc. 674. We cannot go into the evidence in detail; but, in addition to the evidence regarding an express agreement, the actions of all parties concerned strongly corroborate the testimony of the respondent. After this visit of Baird to Lakota in the fall of 1904, when he only remained at most two days, he returned to his home in Austin, Minn., and did not again visit Lakota for nearly a year, although there were 1200 acres plowed in the fall

of 1904, ready for crop, and he knew that without some arrangement of this kind it was an impossibility for respondent to carry on the farm during the year 1905. The evidence shows that he procured no other tenant, and does not disclose that he made any effort to secure any one else to crop the 1200 acres lying in readiness for crop during the season, or to cancel the lease to Van Gordon. Furthermore, T. J. Baird, of Lakota, was appellant Baird's agent and representative, and appears to have understood the facts and arrangements as claimed by respondent, although the record does not disclose that he had any authority himself to make such arrangements, except as he might be inferred to have from the fact that he looked after the interests of appellant Baird in the premises and conducted his business almost entirely without instructions from his principal and in accordance with his own best judgment in all respects. The failure of Van Gordon to farm the land during the season of 1905 would necessarily have resulted in great loss to appellant Baird, not only from the failure to raise a crop on the land, but also because it would leave no possibility of payment of the indebtedness then due him from Van Gordon, and the crop raised in 1905 came into existence through the instrumentality of the third parties who relied upon the waiver by Baird.

It is also insisted that no consideration passed to Baird on his agreement of waiver. We have already said enough in discussing the other question involved to show that he received valuable consideration, but may add that without this arrangement the debt due him was worthless, as plaintiff would have no crop on which his security would attach, plaintiffs' chattels were about to go to sale on a prior mortgage, and his land might lie idle. In fact it was only exchanging security out of which there was no possible chance of realizing anything for security from which there was a possibility, and even a considerable probability, of obtaining some benefit. The agreement which made it possible for Van Gordon to proceed with his contract, on the part of Gronna and others, and the new and more valuable security promised and given by Van Gordon, all constituted a valuable consideration. It is not material whether it was understood that the waiver was on the security of the lease, or on that afforded by such chattel mortgages as Baird had been in the habit of taking. It is clear that it was meant to, and did, apply to Baird's security, without reference to its exact form; and the evidence discloses no right in defendant Goldamer to possession of all the crop at the time this suit was commenced.

The next contention of the appellants is that defendant Goldamer had no notice, either actual or constructive, of this waiver, or of the claims of the third parties that their security was superior to that held by Baird. Early in August, 1905, Baird sold the land covered by the contract to the defendant Goldamer, and included in this sale was the indebtedness of Van Gordon to Baird, secured as hereinbefore described. Goldamer was one of the beneficiaries of the waiver, and he was one of the parties who made an extension and furnished supplies to enable Van Gordon to conduct his farming operations through 1905, although rather vaguely, and with some apparent effort at evasion, he attempts to testify that he had no knowledge of the waiver or agreement regarding the priority of the security. The evidence is clear and certain that he did have such knowledge and acted upon it, and the trial court was warranted in so finding.

Appellants next urge that the plaintiff is not entitled to relief, because they contend that the action is brought solely for the benefit of third persons, who do not appear as parties to the action, and that he has no interest in the application of the crop in question to any particular indebtedness. With this contention we cannot agree. The evidence shows that the agreement, if not made directly with plaintiff, was made through his solicitation; that he, being unable to proceed with the contract without assistance, would lose the benefit of 1200 acres of plowing done by him on the land, and the prospective profits on his share of the crop; that his personal property would go on foreclosure, and that great financial loss was likely to result, without some such arrangement. It also shows that he persuaded the third parties to lend the needed assistance, representing to them that the security which he offered and gave would be superior to that of Baird. Under these circumstances he not only had the right to insist that the proceeds of the crop on which the security was given should go to the holders of the superior liens, but a plain duty was imposed on him—the duty to take all necessary and possible steps to secure the application of the proceeds in accordance with the agreement, and where they, in law and equity, belonged. While it is true that these various parties had remedies of their own, that fact in no manner relieved the plaintiff of his obligation. The statutes designate the proper parties to an action, and also indicate the proper practice where

there is a defect in the parties. It is by demurrer or answer. The defendants did not demur, and answered only to the merits. Sections 6854, 6857, Rev. Codes 1905; 15 Enc. Pl. & Pr. 475. They thereby waived their rights to this objection. Section 6858, Rev. Codes 1905; *Ross v. Page*, 11 N. D. 459, 92 N. W. 822. And it is too late to suggest such objection for the first time in this court. *Dunn v. Tozer*, 10 Cal. 167; *Fairmount Coal Company v. Hasbrecht*, 48 Hun (N. Y.) 206.

Goldamer took possession of the premises during the harvest of 1905 and it appears claimed immediate possession of the whole crop raised, and that his security was superior to that of the creditors who had furnished supplies. The plaintiff asks in this suit to have the proceeds of the crop appropriated to the payment of the debts for which it was security in the order of priority, and to avoid the threatened legal conflict between third parties, appellant Goldamer and the respondent, and to save a multiplicity of suits. This he had a right to do. To secure this he asked to have a receiver appointed to take charge of the crop. The court denied this application and entered judgment to the effect that the defendant holds the proceeds of the plaintiff's three-fourths share of the crop in controversy, subject to the claims of the several creditors, to whom security thereon was given by plaintiff for supplies and advances, or for extension of prior existing secured debts under the agreement of waiver, and to the rights and claims of all such creditors in and to such portion of said crop, and the proceeds thereof are prior and paramount to any right or claim of the defendant Goldamer thereto by virtue of the farm lien or contract mentioned. We are advised on argument that defendant Goldamer gave a bond as security to these creditors and respondent for the proper application of such proceeds, and that the proceeds of such crop would be forthcoming in case the judgment of the district court should be affirmed. We are of the opinion that the showing made would have justified the appointment of a receiver, but the method adopted by the district court will doubtless serve the same purpose and protect the rights of the various parties.

Just prior to the argument of this case the attorneys for the defendant filed in this court an affidavit of the plaintiff, Van Gordon, stating that he desired the judgment and decree appealed from reversed, and that judgment be rendered in this cause for

such reversal, and for the dismissal of this case on the merits with prejudice, and with costs in favor of the defendants, and that he had entered into a stipulation filed with such affidavit, to that effect, for the purpose of terminating the litigation. He further states in said affidavit that counsel who appeared and represented him in this case were not employed by him, but were employed and were acting for third parties mentioned in the complaint, who claim an interest in the subject-matter of the litigation. In connection with the affidavit so filed is a stipulation signed by the plaintiff, Van Gordon, himself, and Frich & Kelly, attorneys for appellants, stipulating that the respondent confesses error in the making and rendition of the decree entered in the district court in each particular set out in appellant's brief, and further stipulating that a judgment and order of reversal of said decree may be made in the Supreme Court, providing for any such reversal and for the dismissal of this case on the merits, with prejudice, and for costs in both courts in favor of the appellants and against respondent, and requesting the Supreme Court to enter such judgment and order, and remand this case to the district court to carry into effect such stipulation. Neither counsel for respondent nor the other interest lienholders executed or knew of this stipulation and motion till presented in this court. This is a novel proposition. We say so, because it is novel to us, and we are unable to find any authorities directly in point. The appellants' counsel on the oral argument cited a few cases; but on examination we find they establish no principles applicable to this motion, though one is to the effect that such stipulation will be recognized when justified by the record. We shall not undertake to distinguish between the different authorities regarding the right of a suitor to dismiss his action without the knowledge or consent of his attorney. There are respectable authorities on both sides of the question. This court held, in *Paulson v. Lyson*, 12 N. D. 354, 97 N. W. 533, that under the facts of that case the action could be dismissed by stipulation signed by the defendant without the knowledge or consent of his attorney of record, and from a casual reading of the opinion, it would seem to apply to this case; but the court attempted to distinguish that case from certain other cases apparently holding to the contrary, and referred with seeming approval to *Toy v. Haskell*, 128 Cal. 558, 61 Pac. 89, 79 Am. St. Rep. 70, in which the facts were very similar to those in the

case at bar, and which negatives the right of the plaintiff to dismiss, on the ground that a party can only be heard in court through his attorney, when he has one; hence we are constrained to suggest that, if the case at bar disclosed no additional barriers to a recognition of the stipulation, we might cite *Paulson v. Lyson* as authority of our action. We, however, place our decision on other grounds.

Was Van Gordon the plaintiff in this action? Was the suit brought by him, and did the attorney of record act for him through the proceedings in the trial court and to the time when the stipulation for reversal was filed? Van Gordon testified on the trial, and on the main case his testimony occupies 76 pages of the printed record as a witness for the plaintiff, while on rebuttal it occupies two and a half pages. The first question asked him was whether he was the plaintiff in this case, and his reply was, "Yes, sir," and the truth of this was not denied until the appeal was set for argument in this court. We think this, in connection with our observations, *supra*, on appellants' contentions that Van Gordon had no interest in the controversy which entitled him to bring the action, make it clear that he is the plaintiff. Whatever the facts may be regarding his initiating the suit and his original employment of Mr. Rex as his attorney, he most emphatically ratified the bringing of this suit and the procedure adopted by his record counsel in its conduct, and made him his attorney in this case. We are unable to see that the fact that third parties would derive either direct or incidental benefit from the result, if the efforts of counsel were successful, and saw fit to contribute to his employment, makes him any the less, under the circumstances, the attorney of the plaintiff than he otherwise would have been. The plaintiff, Van Gordon, had knowledge of the facts, aided or was aided to secure what he and those interested with him deemed to be just, and we think, after doing so, he cannot be heard to say that he did not employ the counsel or authorize the action. Having ratified them, he is in the same position as though he had acted from the beginning. To say the least, all the circumstances surrounding the trial and other proceedings serve as a ratification. *Dresser v. Wood*, 15 Kan. 344; *Hodgins v. Heaney*, 17 Minn. 45 (Gil. 27); *Hughes Co. v. Ward* (C. C.) 81 Fed. 314.

Some cases hold that the authority of an attorney to appear must be raised in the trial court, and cannot be raised for the first

time on appeal. 2 Enc. Pl. & Pr. 681, and cases cited. We are unable to reach a conclusion that parties, by stipulating that error has been committed by the trial court, can bind the court to find error, when none is actually disclosed on examination of the record, and when it appears on argument that to give effect to such stipulation would work great injustice to parties interested financially in the result of the litigation, and who have, as conceded, furnished in good faith to respondent the means for its prosecution. The lien claimants were also clients in this matter of the attorney of record for the respondent. As we have shown, they were interested in the result of the suit, and with full knowledge of the plaintiff they participated in the proceedings, and furnished the means with which to conduct the litigation. This was also with the knowledge of at least defendant Goldamer and his counsel. With knowledge of all these facts, the action of the plaintiff and defendant in attempting to dismiss verges very closely upon fraud. Under other circumstances we might arrive at a very different conclusion. The defendant Goldamer, as we have before stated, furnished a bond to account for the proceeds of the crop in accordance with the direction of the court, and has retained possession of the crop or of such proceeds. In so doing he may be said to have accepted benefits under the judgment entered by the trial court, and his action comes near being a waiver. Most of the authorities cited in appellants' brief on the motion to dismiss relate to cases in which there was an agreement that the compensation of attorneys should be taken from the judgment when collected, or there was a verbal agreement for the assignment of a portion of the judgment. In either case the parties in whose interest the dismissal was sought had no knowledge or information as to third parties being interested or the rights of attorneys, and several cases intimate that with such knowledge the decision might have been different. Although a nominal or legal plaintiff may dismiss or discontinue a suit brought for the use of another, where the latter is shown to have no beneficial interest in the subject-matter in controversy, and although there are a few early decisions which, following the rule that courts of law consider only legal rights, hold that the plaintiff of record may dismiss, even though it is alleged and offered to be proved that the beneficial interest is in another, yet the rule under the weight of authority is that, where persons other than the plaintiff of record are interested in the prosecution of a

suit, the courts will protect the rights of such persons, and will not permit the plaintiff to dismiss to the prejudice of the persons beneficially interested. 14 Cyc. 397.

The application to dismiss is denied, and the judgment of the trial court is affirmed. All concur.

FISK, J., being disqualified, did not sit on the hearing of the above entitled action, nor take any part in the decision; JUDGE JOHN F. COWAN, of the Second Judicial District, sitting in his place by request.

(113 N. W. 609.)

NELS JOHNSON AND SYVER JOHNSON, CO-PARTNERS AS JOHNSON BROTHERS, v. RICHARD GLASPEY AND WILLIAM RENNIE, CO-PARTNERS AS GLASPEY AND RENNIE.

Opinion filed Sept. 4, 1907. Rehearing denied Oct. 26, 1907.

Justice of the Peace — Appeal — Bond.

1. The defendants appealed from a judgment of a justice of the peace to the district court, and furnished only an undertaking in conformity with section 8503, Rev. Codes 1905, relating to appeals from justice's court. *Held*, that the words "all costs" contained in the undertaking in accordance with the requirements of section 8503 are sufficiently comprehensive to cover costs on appeal, and that the district court acquired jurisdiction without filing the bond mentioned in section 8502, Rev. Codes 1905.

Same — Claim and Delivery — Verdict Not Responsive to Issues Invalid.

2. In an action in claim and delivery in which the issues were as to the right of possession, damages, and the right to and the amount of the lien claimed on the property in suit, the jury returned a verdict as follows: "We, the jury in said action, do hereby find for the defendant in the sum of \$12.00." *Held*, that this verdict was not responsive to the issues, and was not in law a verdict.

Same — Defective Verdict — Retrial.

3. Under the provisions of section 8428, Rev. Codes 1905, which is to the effect that, if the jurors are discharged without rendering a verdict, "* * * the court shall proceed again to trial as in the first instance, until a verdict is rendered," where the jury returned what was in form a verdict, but which failed to find on all the material issues, the justice was warranted in holding that it was not a lawful verdict, and in setting the case for retrial.

Trial — Definition of Verdict.

4. The word "verdict" is not an abstract designation of the finding of a jury after a case is submitted to it, but relates to the issues raised by the pleadings and evidence, and what may in form be a verdict is not such in law unless it substantially responds to all the issues.

Appeal from District Court, Ward county; *Goss, J.*

Action by Nels Johnson and Syver Johnson against Richard Glaspey and William Rennie. Judgment for defendants, and plaintiffs appeal.

Reversed.

Geo. H. Gjertsen, for appellants.

Appeal bond was insufficient, and appeal should have been dismissed. *Doering v. Jensen*, 91 N. W. 343.

Verdict must respond to the issues, or no judgment can follow. *Holt v. Van Eps*, 1 Dak. 192, 46 N. W. 691; *Michon v. Ayalla*, 84 Tex. 685; 2 Enc. Pl. & Pr. 868; *Walston v. Walston*, 24 S. W. 951, 28 Am. & Eng. Enc. of Law (1st Ed.) 283; *Traun v. Wittick*, 27 Ala. 571; *Stiles v. Granville*, 6 Cush. 458; *Swain v. Roys*, 4 Wis. 150; *Holman v. Kingsbury*, 4 N. H. 105; *Gerrish v. Train*, 3 Pick. 124; *Allison v. Dartom*, 24 Mo. 343; *Jones v. Snedecar*, 3 Mo. 390; *Pratt v. Rogers*, 5 Mo. 52; *Dunbar v. Bittle*, 7 Wis. 143; *Smith v. Lewis*, 20 Wis. 350; *Blakeley v. Duncan*, 4 Tex. 184; *Avery v. Avery*, 62 Am. Dec. 513, 12 Tex. 54.

H. W. Braatchien, for respondents.

Without statutory authority a justice cannot pass upon a verdict of the jury. *Lyman-Eliel Drug Co. v. Cook*, 12 N. D. 88, 94 N. W. 1041.

Justice must enter verdict as returned. Rev. Codes 1905, section 8436; *Sluga v. Walker*, 9 N. D. 108, 81 N. W. 282; *Lynch v. Kelly*, 41 Cal. 233; *In re Dance*, 2 N. D. 184, 49 N. W. 733; *Plano Mfg. Co. v. Stokke*, 9 N. D. 40, 81 N. W. 70.

SPALDING, J. This is an action in claim and delivery, and the first question presented for consideration is whether an undertaking on appeal from justice court to district court drawn in accordance with the requirements of section 8503, Rev. Codes 1905, is suf-

ficient to give the district court jurisdiction without containing any provisions in the express language of section 8502, Rev. Codes 1905. The judgment of the justice court was for the plaintiffs, and, in the alternative, holding them to be the owners and entitled to the possession or the value of the property in question, and awarding them damages for detention and costs. Defendants appealed to the district court on questions of law alone, and furnished an undertaking in the following language: "Whereas, on the 31st day of October, 1905, before David Landis, Esq., justice of the peace in and for the county of Ward, and state of North Dakota, the above-named respondents recovered a judgment in an action pending in said court against the above-named appellants for the immediate return and possession of specific personal property, and for damages and detention and costs taxed at sixty-two dollars or the sum of one hundred seventy-five and no-100 dollars if possession cannot be had and for the sum of twenty and no-100 dollars and costs taxed at \$62.00 making a total judgment of \$257.00 and the above named appellants feeling aggrieved thereby, intend to appeal therefrom to the district court of said county: Now, therefore, we, Glaspey and Rennie, copartners, and appellants, principal, and H. V. Hollingsworth and William Glaspey, sureties, of the county of Ward and state of North Dakota, do hereby undertake, promise, and agree if the appeal is dismissed or if judgment is rendered against the appellants * * * in the sum of five hundred twenty-five and no-100 dollars, that appellants in the appellate court will deliver the property above referred to and pay all damages for the taking or detention thereof and all costs, or pay the sum fixed by the judgment as the value of the property together with the damages awarded for the taking or detention thereof and all costs not to exceed the sum above mentioned. Dated November 9th, 1905." The plaintiff submitted a motion to dismiss the appeal for lack of the undertaking required by section 8502, Rev. Codes 1905, and the district court overruled this motion, and defendants had judgment.

Sections 8502 and 8503 read as follows: Section 8502: "To render any appeal effectual for any purpose an undertaking must be executed on the part of the appellant by sufficient surety to the effect that the appellant will pay all costs which may be awarded against him on the appeal, not exceeding \$100.00." Section 8503: "If the appellant desires a stay of execution an under-

taking must be executed on his part by sufficient surety to the effect, that if the appeal is dismissed, the appellant will pay the amount of the judgment appealed from and all costs, or if judgment is rendered against him in the appellate court, that he will pay the amount of such judgment and all costs not exceeding a sum specified in the undertaking, which must be at least one hundred dollars and not less than twice the amount of the judgment appealed from; or, if the judgment appealed from is for the recovery of specific personal property an undertaking must be executed on the part of the appellant by sufficient surety to the effect that if the appeal is dismissed or if judgment is rendered against the appellant in the appellate court, the appellant will deliver the property described in the judgment and pay the damages awarded for the taking and detention thereof and all costs or pay the sum fixed by the judgment as the value of the property together with the damages awarded for the taking or detention thereof and all costs. Such undertaking shall be approved and filed as provided in last section." It is contended that the undertaking furnished was inadequate to cover costs on appeal, and that, in addition to this undertaking, another undertaking should have been given for that purpose. This is purely a question of construction, and must be determined by considering whether the language of the undertaking in the action was broad enough to cover the costs on appeal. It will be observed that the undertaking was for more than \$100, and, as to costs, it provides for the payment of all costs not to exceed \$525. After careful consideration, we have arrived at the conclusion that the term "all costs," in the connection in which it is used in the undertaking, is comprehensive enough to include costs on appeal. We cannot conceive of any costs to which the prevailing party in the district court would be entitled on appeal, or on the dismissal of an appeal from the justice court which would not be included in the term "all costs," and we hold that the undertaking was sufficient as an undertaking to give the district court jurisdiction.

The next question arises over the action of the justice court which is complained of in the appeal to the district court. It was admitted that the ownership of certain cattle was in the plaintiffs, and that they were taken by the defendants to pasture during the season. While in the possession of the defendants they caused them to be vaccinated, and proposed to charge the plaintiffs

the sum of \$4 for this service in addition to the charge for pasturing. The plaintiffs declined to pay this sum, and, on the refusal of defendants to deliver possession unless paid, plaintiffs brought this action. The issues were as to the amount of defendants' lien, if any, and as to who was entitled to possession of the cattle and to damages for their detention. At the conclusion of the trial the jury returned a verdict in this form, omitting the title, etc.: "We, the jury in said action, do hereby find for the defendant in the sum of \$12.00." It appears that the jury was discharged before the justice examined this pretended verdict, and that, upon reading it, he decided that it was not a verdict in accordance with the provisions of section 8428, Rev. Codes 1905, which is to the effect that if the jurors are discharged without rendering a verdict, or because they cannot agree, the court shall proceed again to trial as in the first instance, until a verdict is rendered. The justice then set the case for retrial the next day. It appears that both the plaintiffs and defendants by their counsel were present during this action of the court, and that neither party made any sort of objection to the case being set for retrial. When the case was called for trial the next day, the defendants defaulted, and judgment was entered for the plaintiffs, and from such judgment appeal was taken to the district court. Section 8427, Rev. Codes 1905, relating to verdicts in justice court as applicable to this case, requires the verdict to be as follows: "In an action to recover possession of personal property, to the effect that the jury find the plaintiff or defendant entitled to possession or if not in possession, to a delivery of the property therein described, specifying its value article by article, and to damages if claimed, for its detention, in a sum therein stated as assessed by the jury. If the finding is in favor of the plaintiff as to part of the property, the verdict shall contain a like finding in favor of the defendant as to the residue." The plaintiffs complain that this so-called verdict was not responsive in any degree to the issues, or to the requirements of this section, for it failed to make any finding as to the right of possession or to specify the value of the cattle, and contained no finding as to damages, or the amount of defendants' lien, if any. While in form a verdict, we are of the opinion that in a legal sense it was not a verdict. Cases are very numerous to the effect that a verdict which does not respond to all the issues will not support a judgment. Cases are also very numerous holding that verdicts

of this character in claim and delivery are inadequate and will not sustain a judgment. The word "verdict" is not an abstract designation of the finding of the jury, but it relates to the issues involved in the pleadings and the evidence, and, while it may in form be a verdict, it is not a verdict in law, unless it substantially responds to the issues. This question was elaborately discussed in *Holt v. Van Eps*, 1 Dak. 207, 46 N. W. 689, where it was held that a verdict which finds but part of the issues, and says nothing as to the rest, is insufficient to sustain a judgment, because the jury has not tried the whole issue, and the court in that case also held that where a question of ownership was in issue, and the verdict found that the plaintiff was entitled to possession of the property and damages, it would not sustain a judgment, and the judgment entered thereon was invalid, because the jury failed to find on the issue of ownership. A verdict in a legal sense generally is the determination of the jury upon the matters of fact in issue in a cause upon the evidence. The general rule is that the verdict must comprehend the whole issue or issues submitted to the jury in a particular case. *Creighton v. Haythorn*, 49 Neb. 526, 68 N. W. 934; *Wilson v. City National Bank*, 51 Neb. 87, 70 N. W. 501; *Aultman & Co. v. McDonough*, 110 Wis. 263, 85 N. W. 980; *Day v. Webb*, 28 Conn. 140; *Froman v. Patterson*, 10 Mont. 113, 24 Pac. 692; *Hawley v. Barker*, 5 Colo. 118; *Simmons v. Hamilton*, 56 Cal. 493; *Patterson v. U. S.*, 15 U. S. 225, 4 L. Ed. 224; *Farmers' Loan & Trust Co. v. St. Clair*, 34 Mich. 518; *Alderman v. Manchester*, 49 Mich. 48, 12 N. W. 905; 22 Enc. Pl. & Pr. 860, note 2, and following pages.

The Supreme Court of the United States in *Patterson v. United States*, *supra*, passed upon this point, and says: "The rule of law is precise upon this point. A verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious. It results from the nature and the end of the pleading. Whether the jury find a general or a special verdict, it is their duty to decide this very point in issue; and, although the court in which the case is tried may give form to the general finding, so as to make it harmonize with the issue, yet, if it appear to that court, or to the appellate court that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict. It is true that, if the jury find the issue and

something more, the latter part of the finding will be rejected as surplusage; but this rule does not apply to a case where the facts found in the verdict are substantially variant from those which are in issue." Had the jury returned a general verdict, it might have supported a judgment, as it would then have been equivalent to finding specifically for the defendants on all issues.

We are of the opinion that the justice committed no error in proceeding to a retrial. The points on which the appeal was taken to the district court all relate to this action of the justice, so no other questions can be determined.

The judgment of the district court is reversed, with costs. All concur.

(113 N. W. 602.)

COLEAN MANUFACTURING COMPANY, A CORPORATION, v. LOUIS BLANCHETT.

Opinion filed Oct. 15, 1907.

Sale — Delivery on Trial — Oral Modification of Written Agreement — Agent's Authority.

Defendant signed and delivered to plaintiff's agents a written order for certain machinery, to be delivered on conditions specified therein. The order was an offer to purchase which became an absolute contract of sale after acceptance. Plaintiff was ready to deliver the machinery under the order, but defendant refused to accept it unless he was given an opportunity to test the working of the machine by a trial. Plaintiff's agents entered into a new contract with defendant under the same terms as embodied in the order, except that defendant was given the right to test the working of the machine, which was accordingly delivered to defendant. Under these conditions, defendant gave plaintiff his notes and mortgage security, which were to be left with a bank; delivery thereof to abide the event of the trial. The machine did not work satisfactorily and was returned to plaintiff. Plaintiff brings this action to foreclose the mortgage, claiming an absolute delivery of the machine.

Held:

- (1) That there was no delivery of the machine under the written order.
- (2) That the delivery of the machine was under the oral contract, which was subject to conditions.
- (3) That the question of the authority of the agents to modify a written order is not involved in the case.

- (4) That the notes and mortgage never became a contract binding on the defendant.
- (5) That the title to the machine contracted to be sold did not pass to the defendant as the delivery was conditional.

Appeal from District Court, Grand Forks county; *Fisk, J.*

Action by the Colean Manufacturing Company against Louis Blanchett. Judgment for defendant, and plaintiff appeals.

Affirmed.

Turner & Wright, for appellant.

Murphy & Duggan, for respondent.

MORGAN, C. J. This is an action to foreclose a chattel mortgage given to secure three promissory notes for an aggregate sum of \$3,165. The answer sets up certain matters in defense and three separate counterclaims. Two of the counterclaims were disallowed by the trial court, and the defendant does not dispute the correctness of the refusal to allow them. The trial court dismissed the plaintiff's action and allowed a judgment upon one counterclaim for the value of a secondhand threshing rig which the defendant turned over to the plaintiff in part payment for the new threshing machine and attachments, for which the notes and mortgage in suit were given, which said second-hand threshing machine, it is claimed, was wrongfully converted to its own use by the plaintiff. The principal defense interposed by the defendant is that he did not make an absolute purchase of the new machine, but that it was delivered to him for trial only, and, if found on such trial not to do satisfactory work in all respects, then the machine was to be returned to plaintiff and the notes and mortgage to be returned to defendant. The trial court found for the defendant upon the principal issue raised by the answer, and gave judgment for the defendant for the sum of \$948.76 on the counterclaim. The plaintiff appeals and requests a review of all the evidence on a trial de novo under section 7229, Rev. Codes 1905.

The pivotal facts in the record may be summarized as follows: On June 22, 1905, the defendant signed an order for the purchase of a threshing machine and attachments from the plaintiff. Under the provisions of the order, it was subject to approval by the

plaintiff at its home office in Peoria, Ill. The outfit was to be delivered to the defendant at Grand Forks on or about July 20th. This order for the machine provided for payment of freight by defendant, the giving of notes and mortgage by him for the purchase price, the turning over of the second-hand machine upon the delivery of the new machine, and the order contained a warranty that the new machine would do good work and the usual conditions to be complied with by defendant in case the machine did not fulfill the terms of the warranty. The evidence shows that the plaintiff was ready and willing to deliver the machine under the order, and that the order was in effect accepted by the plaintiff at the home office. The order negatives any contention that the machine was taken on the condition that it was to be tried before final acceptance. The order was an absolute order and contained no conditions except the conditions connected with the warranty provisions. Prior to the delivery of the new machine to the defendant, and prior to the delivery of the second-hand rig to the plaintiff, the defendant claims that a new contract was entered into between him and the plaintiff through its agents, being the same agents that had negotiated the contract evidenced by the order. This new contract was oral and provided for a sale on the same terms contained in the order, excepting that the defendant was to have the right to try the machine and return it if it did not do satisfactory work and as good work as like machines usually do. Defendant testifies that the notes and mortgages were signed on August 23d on this express condition, and that they were not to be delivered to plaintiff at all until after a satisfactory trial, but were to be placed in some bank in Grand Forks for final delivery to plaintiff or defendant, dependent upon the result of the trial. The defendant testified that this oral contract was made in the presence of two of plaintiff's agents, one of whom had died before the trial. The other agent testified positively that no new contract was entered into when the notes and mortgage were signed. The defendant also testifies that he was to have the right to test the machine before acceptance under the contract embodied in the order. He insists that the agent agreed to a trial when the order was signed, but the order did not contain any provision for a trial. Hence there is a square conflict between defendant and plaintiff on the main issue at the trial; one witness testifying positively the one way, and the other as positively the

opposite. The trial court found that the defendant was entitled to belief. The plaintiff's witness is conclusively shown to have been mistaken as to other matters to which he testified in conflict with defendant, and defendant was thoroughly corroborated, as to such other matters; that is, whether the machine did good work or not. Although it is a difficult and embarrassing question of fact to determine, not having seen the witness while testifying, we are satisfied, however, that the defendant has told the truth and should be believed. The defendant was relying on a trial before acceptance of the machine, and insisted on it every time the plaintiff's agents approached him for a settlement; that is, the signing of the notes and mortgage. He was a man experienced in handling certain kinds of threshing machines, but was not familiar with those manufactured by the plaintiff. To insist on a trial under these circumstances would seem perfectly natural and reasonable. Under these circumstances, we have no hesitation in saying that the evidence sustains defendant's contention, thereby agreeing with the conclusion of the trial judge, who had the benefit of the presence of the witnesses before him while testifying.

It is true that the defendant gave notices to the company of the failure of the machine to work in the mode provided for in the order and did some other things that would indicate that he was endeavoring to comply with the terms of the written order. We do not think that these facts show that there was no oral contract. The written contract contained a warranty, and defendant had in his hands a copy thereof, which specified what should be done by defendant in case of a breach of the warranty. Under the oral contract, also, the machine was warranted to do good work. Although it was not incumbent on defendant to serve these notices under a delivery for trial purposes, still it is not a fact that shows that there was no oral contract. The defendant might well have thought it necessary to give these notices, although under the oral contract it was not necessary. The defendant returned the machine after thorough trial and demanded his notes and the delivery to him of the second-hand machine which had been delivered to plaintiff, and that is all that he was required to do.

It is claimed by appellant that the machine worked well and fulfilled the warranty. On a careful review of the evidence, we are satisfied that it is amply shown that it did not. No useful purpose

would be subserved by reviewing the evidence. The defendant gave it a trial in good faith and was not satisfied. The defendant also testifies positively that the machine did not do as good work as other machines. It was therefore established that the warranty failed in all its terms.

The plaintiff presents the following propositions of law as fatal to defendant's contentions: (1) The defendant, having pleaded one contract, cannot recover upon another and wholly different contract. (2) A written contract cannot be changed by a subsequent oral agreement, unless the subsequent agreement is wholly executed. (3) The plaintiff is not bound by any oral agreement or understanding made by its salesmen at the time of the delivery of the machinery, in conflict with the terms of the written order, not brought to the knowledge of the plaintiff and agreed to by it. The answer, it seems to us, alleges the making of a contract for a test of the machine and for the surrender of the notes in case the trial did not show that the machine worked satisfactorily or was as good as other machines. The written order had nothing in it showing that the machine was to be accepted conditionally for trial purposes. The answer also pleads a compliance with the conditions imposed by the written order as to the breach of the warranty. The answer contains sufficient allegations to admit of proof under both the written order and the oral contract. We do not deem this a very material question, as we are satisfied that an oral contract was made after the written order was signed, but before the sale become completed by a delivery of the machine thereunder.

It is true that a written contract cannot be varied by parol, unless executed by the parties after its terms have been varied by agreement; but that principle has no application here under our holding that the machine was delivered for trial only under the oral contract. The appellant insists, however, that the plaintiff's agents had no authority to make a new contract or to modify the terms of the written order, and that defendant had knowledge of the restrictions upon the agents' authority, as such restrictions were printed on the written order which had been signed by defendant. The machine was not accepted by defendant under the written order. It was accepted under a new and independent contract. As to the authority of the agent to make a new contract, we think that what is said in *Nicols & Shepard Co. v. Paulson*, 6 N.

D. 400, 71 N. W. 136, is applicable and decisive of this point, which is as follows: "Plaintiff claims that the general agent had no authority to make such contract, as Spearing well knew by directions to agents printed upon the contract which he had signed. We may grant that to be true. Nevertheless, the fact remains that Spearing refused to receive the outfit upon any other terms than upon trial. If the contract that he had signed and left with the general agent had been in fact delivered, so as to become operative, then this refusal was a direct breach of such contract. Such contract was executory, and no title to the property passed until the buyer accepted it. Rev. Codes, section 3553. The refusal to accept may have given plaintiff a right to recover damages, but the property remained the property of the seller, and the title to the second-hand engine that was to be given in part payment remained in the buyer. These conditions existing, the local agents delivered the outfit to Spearing upon trial, in accordance with what he insisted was the contract. Such delivery was, of course, conditional, and passed no title. Plaintiff insists that the local agents were, to the knowledge of Spearing, unauthorized to make such conditional delivery. This may be granted. It may be true that plaintiff might have retaken the outfit immediately upon such delivery. But that fact could not convert the conditional delivery that was made into an unconditional delivery that was not made. It could not cast upon the buyer title to property that he refused to accept."

It is claimed that *Reeves & Co. v. Corrigan*, 3 N. D. 415, 57 N. W. 80, is decisive of this case. We do not think so. In that case, it was undisputed that the machine was unconditionally delivered under the written order. On the trial the defendants were permitted to show facts that varied the written order and concerning which the agents had no authority to make. This was held to be erroneous, and we think properly so. In this case, however, the written order was not complied with at all, but repudiated for the reason that defendant claimed that he had a right under the original negotiations to test the working of the machine. Upon defendant's repudiation of the order, a new contract was entered into, and the defendant was given the right to do what he claimed should have been included in the written order. This is clearly distinguishable from the *Corrigan* case, just cited. The question as to the authority of the agents to modify the written order does

not therefore become relevant or material in this case. So far as delivery of the machine is concerned, it never became binding on defendant under the written order, as delivery was made under another contract. The fact that defendant served notices in seeming compliance with the written order does not affect this question, although properly in the case for reasons considered as bearing on another point.

The judgment is affirmed. All concur.

FISK, J., being disqualified, did not sit in this case; JOHN F. COWAN, judge of the Second Judicial District, sitting by request. (113 N. W. 614.)

STATE EX REL R. E. FLAHERTY V. O. G. HANSON, SHERIFF OF
GRAND FORKS COUNTY.

Opinion filed Oct. 15, 1907.

Constitutional Law — Supreme Law Clause — Class Legislation — Self-Crimination.

1. The constitutionality of chapter 189, p. 307, of the Laws of 1907 of this state, requiring the registration and publication of internal revenue tax receipts is assailed upon the grounds:

(1) That it is obnoxious to that provision of the United States Constitution (article 6, section 2) which declares that the constitution and the laws of the United States shall be made in pursuance thereof shall be the supreme law of the land; and that the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

(2) That it violates sections 11 and 20 of the state constitution prohibiting special legislation.

(3) That it infringes section 13 of the state constitution, which guarantees immunity from self-crimination.

Same.

2. *Held*, for reasons stated in the opinion, that the act is not vulnerable to any of the objections urged against it.

Licenses — Police Power — Exercise By State — Liquor Traffic.

3. The exercise by congress of the power to tax a business or occupation delegated to it by the federal constitution, and the prescribing of regulations to aid the government in collection of such tax, in no manner curtail or interfere with the exercise by the respective states of their undoubted right under their police power to regulate or entirely prohibit the business or occupation thus taxed, because in its judgment such business or occupation is deemed injurious to the public morals, the public health, or the public safety. The power of

the state to protect its citizens from the evils of intemperance, to enact or enforce any legislation not in conflict with the federal or state constitution, which it deems advisable or necessary for the safeguarding of the public morals and the preservation of the public health, is not only an attribute of sovereignty, but a power inherent in statehood. In all matters relating to the life, liberty, and the property of the citizen, the state is sovereign, so long as it does not conflict with the federal constitution.

Intoxicating Liquors — Regulation of Traffic By State.

4. The act in question, which requires publicity to be given of the fact of the payment of such government tax, is a legitimate exercise by the state legislature of the police power of the state, as it tends to aid in the enforcement of the law against the unlawful traffic in intoxicating liquors.

Same.

5. The manifest object of the law was to aid in the better enforcement of the state statute against the business of the unlawful selling of intoxicating liquors, and not, as petitioner contends, to add to or supplement the regulations of congress upon the subject of taxing such business; and while the necessary effect of the state law may be to indirectly curtail or decrease the revenues to the general government under the act of congress, this is not a valid objection to the law. The legitimate exercise of this power is in no manner curtailed by the fact that the same may incidentally deprive the government of some of its revenue.

Statutes — Construction As a Whole.

6. In construing a statute, the courts will, if possible, give effect to the manifest intent of the legislature, as disclosed by the provisions of the whole act, although in so doing it becomes necessary to disregard the strict letter of the law in some of its provisions. Applying this rule of construction, it is *held* that the act in question applies to all persons in the state who have paid the government tax imposed upon the business of a retail dealer in distilled, malt, and fermented liquors, although they have violated the requirement of congress with reference to the posting of the receipt for the payment of such tax, and hence petitioner's contention that the act in question is special legislation is overruled.

Habeas corpus by the state, on the relation of R. E. Flaherty, against O. G. Hanson, sheriff. Writ quashed.

Petitioner, after a preliminary examination, was committed, in default of bail, to answer to the charge of violating the provisions of chapter 189, page 307, Laws 1907, and has sued out a writ of habeas corpus in this court to regain his liberty, alleging the unconstitutionality of said chapter.

Engerud, Holt & Frame, for petitioner.

J. B. Wineman, State's Attorney, for respondent.

FISK, J. The petitioner, who claims to be unlawfully deprived of his liberty by virtue of a commitment issued by the police magistrate of the city of Grand Forks to the sheriff of Grand Forks county, made application to the Honorable Charles F. Templeton, judge of the district court of the First judicial district, for a writ of habeas corpus to regain his liberty. This application having been denied, he made a like application to this court. A writ was issued as prayed for, and from the petition and return thereto it appears that the petitioner is restrained of his liberty under a commitment issued by such police magistrate committing him to the custody of the said sheriff, in default of bail, to answer to the charge of neglecting to register and publish a receipt issued to him by the government of the United States for the payment of the internal revenue tax upon the occupation of a retail dealer in distilled, malt and fermented liquors.

The sole ground urged by the petitioner for the issuance of the writ prayed for is that the act in question (being chapter 189, p. 307, of the Laws of 1907 of this state, requiring the registration and publication of such receipt) is unconstitutional and void. He asserts that said act is in conflict with the constitution and laws of the United States, and particularly those laws relating to the payment of internal revenue taxes upon the business of selling malt, fermented and distilled liquors; his contention being that the act in question is void: (1) Because it is obnoxious to that provision of the United States constitution (article 6, section 2) which declares that the constitution and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding; (2) because it violates sections 11 and 20 of the state constitution, prohibiting special legislation; and (3) it infringes section 13 of the state constitution, which guarantees immunity from self-incrimination.

We think petitioner's contention clearly untenable upon each ground urged by him. His first ground is predicated upon the erroneous theory that the act in question attempts to prescribe regulations governing the subject of the issuance of such tax re-

ceipt in addition to those regulations prescribed by congress. Such is not the scope nor intent of the act, as we construe it; but, on the contrary, the obvious purpose sought to be accomplished by its enactment was to furnish knowledge to the public and all concerned of the fact that the persons who have paid such tax to the government are or may become engaged in the business of selling intoxicating liquors contrary to the laws of this state. Its purpose, in other words, was solely to furnish knowledge to aid in the enforcement of our statute against the unlawful traffic in intoxicating liquors. That the legislature has the undoubted right, within the police power of the state, to enact a law prescribing reasonable regulations looking to this end, is too well settled to require the citation of authority. Counsel for petitioner do not question such right, but in effect contend that in the enactment of the statute in question the legislature did not assume to act within such police power of the state, but merely sought to add to regulations prescribed by congress upon a subject within the exclusive power of the latter. The fallacy of this argument becomes apparent upon an examination of the law in question, from which it is very clear that the evident object in view in enacting the same was as above stated. It is not questioned, and indeed cannot be questioned, that the purpose of congress in the act aforesaid was solely to raise revenue for the general government by imposing such tax, and the regulations prescribed by congress with reference to posting such receipts was merely for the purpose of effectuating such object. Congress therefore, in imposing such tax and in prescribing regulations requiring the posting of such receipts, acted solely within its power to tax, while the legislature, in enacting the law in question, acted solely within the police power of the state. Among the powers expressly delegated to congress by the federal constitution is the power to tax, and this power, of course, carried with it the power to prescribe necessary and reasonable regulations to enable it to carry out such express powers. On the other hand, the police power, so-called, within the limits of the respective states, is exclusively vested in the legislature of such states. Neither government can, directly or indirectly, interfere with the other in the exercise of functions exclusively belonging to such other. In other words, each government acts wholly independent of the other as to the exercise of functions exclusively belonging to it. It does not follow that, because congress has been given the

power to tax a business or occupation, the states, through the exercise of their police power, cannot regulate or entirely prohibit such business or occupation, although the necessary effect thereof might be to cut off or materially decrease such revenue to the general government. In other words, the taxing power of the government, and the regulations prescribed by congress in relation thereto, in no manner curtail or interfere with, nor were they intended to curtail or interfere with, the exercise by the states of their undoubted police powers. This is not denied, but petitioner contends, as before stated, that the act in question, instead of having for its object the suppression of the liquor traffic, in effect operates to enlarge or add to the regulations prescribed by congress with reference to the publicity of such tax receipts. Counsel for petitioner say: "The act does not purport to regulate the dealing in intoxicating liquors. It assumes only to require those who pay the United States special tax to comply with other and different conditions than those imposed and required by congress." Again, they say: "The North Dakota legislature deemed this congressional regulation insufficient, and have assumed to supplement it by adding further requirements in order to give greater publicity." In this consists the fallacy of petitioner's contention. The legislature, in enacting this law, merely did what it had the unquestioned right to do under the police power of the state. Such power is very broad and is limited only by the constitution and laws of the United States and the constitution of this state. That the legislature has the right, within the police power of the state, to provide that the possession of an internal revenue tax receipt for the payment of the government tax upon the occupation of retail dealer in fermented and distilled liquors shall constitute prima facie evidence that the possessor is violating, or has violated the prohibition law of this state, is too well settled to admit of serious doubt. 23 Cyc. 255, and cases cited. Yet such a law is no less free from the objection urged by petitioner's counsel than is the act in question. If such a law is constitutional, then why cannot the legislature also enact a law making it a public offense for any citizen of the state to procure such a receipt and neglect or refuse to furnish a public record thereof, and to give the most complete publicity to the fact of its issuance? Such a law would certainly have a tendency to aid in the better enforcement of the law against such illegal traffic, and we are aware of no provis-

ion, either in the federal constitution or statutes or in the constitution of the state, which directly or impliedly prohibits such legislation. Petitioner's counsel urged that congress has declared what the duties of a taxpayer are with reference to making public the fact of the issuance of such internal revenue receipts, and that the state cannot add to or detract from such duties. They say: "It cannot attach greater burdens or more onerous consequences on the paying of such federal tax than congress has seen fit to prescribe." This is all very true, but the fallacy of this argument consists in the erroneous assumption, as before stated, that by the act in question the state has attempted to add other duties to the taxpayer, as such, with reference to his compliance with the federal statute. The reasoning of counsel, if carried to its logical end, would inevitably lead to the erroneous theory that congress, by the act imposing such tax and prescribing regulations to aid in the collection thereof, has thereby deprived the states of the exercise of their inherent police powers to regulate or prohibit the business thus taxed, because of the fact that the exercise of such police powers may tend in some degree to interfere with the operation of such federal tax law by discouraging persons from complying therewith. As before observed, congress has not attempted, by the imposition of this tax, nor by the enactment of regulations to aid in its collection, to in any manner interfere with or limit the states in the enactment and enforcement of such laws as they may deem necessary under their police power to either regulate or entirely prohibit the business thus taxed. On the contrary, congress has no such power delegated to it by the constitution. The power to tax and the incidental power to make regulations to aid in the collection of such tax, does not in the least interfere with the police power of the state to regulate or prohibit the business thus taxed.

The other grounds urged why the act should be declared unconstitutional are, we think, wholly devoid of merit. To say that the law is special legislation is equivalent to saying that, because all persons who engage in the business of selling intoxicating liquors do not comply with the federal statute by the payment of the government tax, the legislature is powerless to prescribe regulations for those who do pay such tax. In other words, that, because a certain class of citizens may choose to violate the federal tax law by not paying the tax or otherwise complying with the

regulations of congress with reference to posting the tax receipt, the legislature is powerless to legislate as to the class who do comply with such law. If this argument be sound, then the mere fact that there exists two classes of persons engaged in the business of selling intoxicating liquors in this state, viz., those who have complied with the federal law and those who have not, makes it impossible for the legislature to deal with either class. Such contention cannot be upheld. The legislature had a right to assume that all persons engaging in the business of selling intoxicating liquors would comply with the federal law, and, in any event, they had a right to treat such persons in one class and to prescribe reasonable regulations for their observance. If this cannot be done, then the large number of persons coming within such class would be free from legislative regulation or control simply for the reason that a certain class of persons do not come within the terms of the act because of their violation of the federal law. The argument of petitioner's counsel to the effect that the act applies only to those persons who have complied with the federal statute with reference to posting the receipts for the payment of such tax is, we think, unsound. While section 2 of the act, when given a literal construction, and without considering the other portions of the act, would appear to sustain petitioner's contention, in this respect, we think it apparent that when the whole act is construed together the legislative intent that the same shall apply to all who have paid the federal tax is apparent and such intent must be given effect. That the court in construing a statute must give effect, if possible, to the spirit and intent of the act, so as to effectuate the object sought to be accomplished by the legislature, even though such construction may not seem warranted by the strict letter of its language, is well settled. *Vermont Loan & Trust Co. v. Whithed*, 2 N. D. 82, 49 N. W. 318; *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *Boyle v. Northwestern Mutual Relief Ass'n.*, 95 Wis. 312, 70 N. W. 351; 26 Am. & Eng. Enc. of Law, 602, and cases cited. In *Vermont Loan & Trust Co. v. Whithed*, 2 N. D., at page 101, 49 N. W. 323, Judge Bartholomew, in disposing of the question of the power of the court to place a limitation upon the language employed by the legislature in order to give effect to the evident object sought to be accomplished by the act, quoted approvingly from the decisions of other courts as follows: "In construing an instrument, the true intention of the framers must

be arrived at, if possible, and, when necessary, the strict letter of the act, instrument or law, must yield to the manifest intent." "Effects and consequences of a construction are to be considered, and when, from a literal interpretation, an effect would follow contrary to the whole intent and spirit of the statute, the intent and not the literal meaning must be regarded." "Whenever such intention can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to the letter of the statute." Section 1 of the act by its terms expressly requires every receipt, stamp or license showing the payment of the special tax levied under the laws of the United States to be registered and published, and if petitioner's contention is sound as to the construction to be given section 2, then these two sections are conflicting. We are convinced, from a consideration of the whole act, that the same was intended to apply alike to all persons in this state having in their possession such receipt, whether the same has been posted or not in compliance with the federal statute, and therefore that the act is not vulnerable to the objection that it is special legislation.

Petitioner's last ground of objection to the validity of the law is that it infringes section 13 of the constitution of this state, which guarantees immunity from self-crimination. We are unable to see any force to this contention. It is certainly legitimate for the legislature, under its police power, to require the utmost publicity in this respect, to the end that a law prohibiting a business injurious to the public welfare may be strictly enforced. In *State v. Donovan*, 10 N. D. 203, 86 N. W. 709, this court held that it was not an infringement of this section of the constitution to permit the introduction in evidence of the public record of sales which a druggist holding a permit is required to keep by section 9359 of the Revised Codes of 1905. Counsel's contention in the case at bar would, in effect, lead to the conclusion that the above section, requiring the druggist to keep such record, is unconstitutional as being violative of the constitutional provision guaranteeing immunity from self-crimination. And the same reasoning, if sound, would also render void the provision of our Code (section 9383) making the fact that any person has or keeps posted such internal revenue receipt prima facie evidence that such person

is guilty of keeping for sale and selling intoxicating liquors contrary to law. We cannot yield our assent to such a doctrine.

Our conclusion is that the act in question is not vulnerable to any of the objections urged against it by petitioner's counsel.

The writ is accordingly quashed. All concur.

(113 N. W. 371.)

MOSES DEARDOFF v. THORSTEN THORSTENSEN.

Opinion filed Oct. 16, 1907.

Justices of the Peace — Appeal — Filing Bond.

1. In an appeal to the district court from a judgment rendered in justice court, the filing of an undertaking with the clerk of the district court within 30 days after the rendition of the judgment is a prerequisite to the transfer of jurisdiction to the district court.

Same — Waiver.

2. The filing of an undertaking in such cases pertains to the jurisdiction of the district court over the cause and subject-matter of the appeal and cannot be waived by consent of the appellee in submitting to the jurisdiction of the district court.

Appeal from District Court, Wells county; *Glaspell, J.*

Action by Moses Deardoff against Thorsten Thorstensen. Judgment for defendant, and plaintiff appeals.

Reversed.

Plinn H. Woodward, for appellant.

Appeal papers must be filed in the period prescribed by law. *Eldridge v. Knight*, 11 N. D. 552, 93 N. W. 262; *Smith v. Coffin*, 70 N. W. 636; *Campbell v. Richardson*, 81 N. W. 31; *Brown v. Brown*, 81 N. W. 627; *Rudolph v. Herman*, 50 N. W. 833; *Croker v. Superior Court*, 58 Cal. 177.

Jurisdiction on appeal cannot be waived; it is conferred only as prescribed by law. *Ramsdell v. Duxberry*, 85 N. W. 221; *Brown v. Chicago, M. & St. P. Ry. Co.*, 75 N. W. 198.

General appearance in such a case does not confer jurisdiction. *Houser v. Nolting*, 78 N. W. 955; *Reedy v. Howard*, 76 N. W. 304; *Miner v. Francis et al.*, 3 N. D. 549, 58 N. W. 343; *Benoit v. Revoir*, 8 N. D. 226, 77 N. W. 605.

H. J. Bessesen, for respondent.

General appearance, accepting service of notice to take deposition, attendance upon taking depositions, waive notice of appeal. *Bates & Wright v. Scott Bros.*, 26 Mo. App. 428; 2 Enc. Pl. & Pr. 231, 618, 632, 648; *Stephen v. Nebraska, Etc., Ins. Co.*, 29 Neb. 187; *Tyson v. Tyson*, 68 N. W. 1015; *Price v. Pittsburg, etc., R. Co.*, 40 Ill. 44; 3 Cyc. 504, 528; *Towers v. Lamb*, 6 Mich. 36.

MORGAN, C. J. This action was commenced in justice's court and resulted in a judgment by default in favor of the plaintiff on May 8, 1903, for the sum of \$120.42, damages and costs. On June 4, 1903, the defendant served a notice of appeal, undertaking, and answer upon the plaintiff's attorney, and personal service was admitted by said attorney. The undertaking had been approved as to form and sufficiency by the clerk of the district court prior to its service on the attorney. Neither the notice of appeal, undertaking or answer was filed in the office of the clerk of the district court until November 24, 1903. When the action was called for trial in the district court on March 17, 1904, the plaintiff moved for a dismissal of the appeal on the sole ground that the notice of appeal and undertaking were not filed in the office of the clerk of the district court within thirty days from the rendition of the judgment. This motion was denied, and the trial which followed resulted in a verdict for the defendant. The plaintiff appeals from the judgment of dismissal rendered on the verdict. The sole error specified is the refusal of the court to dismiss the appeal.

Two questions are presented for decision in the appeal: (1) Was the failure to file the notice and undertaking in the clerk's office within thirty days from the rendition of the judgment jurisdictionally fatal to the appeal? (2) If such filing is jurisdictional, was there a waiver of the failure by a submission to the jurisdiction of the district court after the papers were therein filed?

Appeals are matters of statutory regulation, and, unless the statute has been complied with, there is no appeal, unless there is a noncompliance with some requirement that can be and has been waived. The provisions of the statute in reference to appeals, so far as applicable to this case, are the following: Section 8500, Rev. Codes 1905, provides that: "Any party dissatisfied with a judgment rendered in a civil action in a justice's court, whether

the same was rendered on default or after a trial, may appeal therefrom to the district court * * * at any time within thirty days after the rendition of the judgment. The appeal is taken by serving the notice of appeal on the adverse party or his attorney and by filing the notice of appeal together with the undertaking required by law with the clerk of the district court of the county in which the appeal was taken." Section 8502, Rev. Codes 1905, is as follows: "To render an appeal effectual for any purpose, an undertaking must be executed on the part of the appellant by sufficient surety to the effect that the appellant will pay all costs which may be awarded against him on the appeal, not exceeding one hundred dollars, which undertaking shall be approved by and filed in the office of the clerk of the district court of the county in which the appeal is taken." No changes have been made in the law relating to appeals from justice's court since the cases of *Richardson v. Campbell*, 9 N. D. 100, 81 N. W. 31, and *Eldridge v. Knight*, 11 N. D. 552, 93 N. W. 860, were decided. In the first-named case it was decided that the service of the undertaking on appeal was an essential prerequisite to the transfer of jurisdiction from the justice's court to the district court. In the last case, it was decided that service of the undertaking is to be made before approval and filing. In the last case it was also in effect held that service, approval and filing in the clerk's office must be made within thirty days after judgment.

In the case at bar, the undertaking was approved before service or filing, but the same was not filed in the clerk's office within the statutory time. Did the failure to file the notice and undertaking within thirty days deprive the district court of jurisdiction? We think it did. The language of section 8500 is plain and unambiguous. It specifies that the appeal is taken by serving the notice and by filing the same together with the undertaking in the clerk's office. This must be read in connection with what precedes it—the same section—that the appeal may be taken within thirty days after judgment. A subsequent act provides for the service of the notice and undertaking and the filing thereof within thirty days are necessary to the transfer of jurisdiction from one court to another. The doing of these acts within said time is incumbent on the appellant, and failing to do them defeats his appeal. The district court does not acquire jurisdiction of the appeal unless these acts are performed within the said time. The performance of these

necessary acts pertains to the subject-matter of the appeal. The filing of the undertaking is as much a jurisdictional essential under the terms of section 8500, *supra*, as the giving and filing of notice. By serving and filing the notice, jurisdiction of the person is acquired. By serving and filing the undertaking, jurisdiction of the subject-matter is acquired. In addition to the cases cited in this court, see *Rudolph v. Herman*, 2 S. D. 399, 50 N. W. 833; *McDonald v. Paris*, 9 S. D. 310, 68 N. W. 737; *Smith v. Coffin*, 9 S. D. 502, 70 N. W. 636; *Bonnell v. Vancise*, 8 S. D. 592, 67 N. W. 685.

It is earnestly claimed on behalf of the respondent that the plaintiff waived the failure to file the undertaking in time by his acts prior to the making of the motion to dismiss the appeal. These acts consist of failure to make the motion to dismiss upon the call of the calendar on the first day of the term, and in addition thereto that he subpoenaed witnesses on the trial and gave notice of the taking of his own deposition and that of others, and that such depositions were taken to be used at the trial, and that plaintiff appeared by attorney at the taking of such depositions. Whether these acts would constitute a waiver of the giving of a notice of appeal under which jurisdiction of the person is acquired on appeal we need not determine. In our opinion they do not constitute a waiver of the filing of the bond by the appellant. The filing of the bond was jurisdictional to the subject-matter of the appeal. Without it, the district court had no jurisdiction of the appeal, although it may have had personal jurisdiction of the appellant. The filing of the bond is not solely for the benefit of the appellee. The court and the public are interested in seeing that appeals are perfected by the giving of the undertakings prescribed by the statute. Public policy requires that frivolous appeals be not made without compliance with the requirements prescribed by law. As stated in *Santom v. Ballard*, 133 Mass. 464: "He claimed an appeal, but did not file the bond as required by law. The superior court therefore had no jurisdiction of the case and might dismiss it on its own motion or on motion of the appellee at any time before judgment. In many cases where there has been no objection to the jurisdiction because of some irregularity or defect in the service or some merely technical defect in the process, it has been held that a general appearance by the defendant is a waiver of such objection. But this rule applies only in cases where

the court has jurisdiction of the subject-matter. Consent of parties may in a certain sense give jurisdiction of the person, but it cannot create jurisdiction over the cause and subject-matter, which is not vested in the court by law. * * * The provisions of law requiring a bond are not wholly for the benefit of the appellee, but partly upon considerations of public policy to discourage frivolous and vexatious litigation." See, also, *Eldridge v. Knight*, supra. *Brown v. C. M. & St. P. Ry. Co.*, 10 S. D. 633, 75 N. W. 198, 66 Am. St. Rep. 730; *Coker v. Superior Court*, 58 Cal. 178; *Brown v. Brown*, 12 S. D. 380, 81 N. W. 627.

It was error to refuse to dismiss the appeal.

Reversed. All concur.

(113 N. W. 616.)

POWERS ELEVATOR COMPANY v. F. J. POTTNER.

Opinion filed Oct. 16, 1907.

Constitutional Law — Title of Act.

1. The provisions of chapter 101, p. 129, Laws 1901, giving a lien to materialmen and laborers upon buildings erected upon land occupied by persons pursuant to the land laws of the United States, is germane to the title to said law, being "an act regulating the filing and foreclosure of mechanic's liens upon lands held or occupied under a filing under any of the land laws of the United States," and does not contravene the provisions of section 61, article 2, constitution, providing that the subject of an act shall be expressed in its title.

Same — General Laws — Uniform Operation — Mechanic's Lien on Public Land.

2. An act giving to materialmen and laborers a lien upon buildings erected upon government lands held under the laws of the United States is not repugnant to the constitution, providing that all laws of a general nature shall have a uniform operation.

Appeal from District Court, Eddy county; *Burke, J.*

Action by the Powers Elevator Company against F. J. Pottner. Judgment for plaintiff, and defendant appeals.

Affirmed.

S. E. Ellsworth, for appellant.

When the subject of an act is announced in its title, means and instrumentalities may be created in the act for its accomplishment, but not vice versa. *State v. Nomland*, 3 N. D. 427, 57 N. W. 85; *Richards v. Stark County*, 8 N. D. 392, 79 N. W. 863; *Divet v. Richland Co.*, 8 N. D. 65, 76 N. W. 993; *State v. Woodmansee*, 1 N. D. 246, 46 N. W. 970; *State v. Haas*, 2 N. D. 202, 50 N. W. 254; *Power v. Kitching*, 10 N. D. 254, 86 N. W. 737; *Paine v. Dickey County*, 8 N. D. 581, 80 N. W. 770; *Miss. & R. Boom Co. v. Prince*, 24 N. W. 361; *State v. Smith*, 28 N. W. 241; *Astor v. N. Y. Ry. Co.*, 20 N. E. 594.

The legislature may classify objects upon which the law is to operate, but the classification must be determined upon principle and be reasonable. *Edmonds v. Herbrandson*, 2 N. D. 270, 50 N. W. 970; *Nichols v. Walters*, 33 N. W. 800; *Beleal v. N. P. Ry. Co.*, 15 N. D. 318, 108 N. W. 33; *People v. Central Pac. Ry. Co.*, 23 Pac. 303; *Dundee Mortgage Co. v. School District*, 19 Fed. 359; *State v. Mayo*, 15 N. D. 327, 108 N. W. 36; *Angell v. Cass Co.*, 11 N. D. 265, 91 N. W. 72; *Miller v. Kister*, 8 Pac. 813; *In re Abell*, 77 Pac. 621; *Wagner v. Milwaukee County*, 88 N. W. 577; *Webb v. Downes*, 101 N. W. 966; *State v. Boyd*, 5 Pac. 735; *State v. Bargus*, 41 N. E. 245.

Maddux & Rinker, for respondent.

An amendatory statute must be construed with the original act. *Holbrook v. Nichol*, 36 Ill. 131; *People v. Whipple*, 47 Cal. 592.

A law must have equality of operation upon persons according to their relation. *State v. Fraternal Knights & Ladies*, 77 Pac. 500.

MORGAN, C. J. This is an action to foreclose a mechanic's lien upon buildings situated upon land occupied by the defendant under the homestead laws of the United States. The sole question presented on the appeal pertains to the constitutionality of chapter 101, p. 129, Laws 1901. Two objections are urged in support of the contention that the law is unconstitutional: (1) That the subject of the act is not wholly embraced within its title; (2) That the law is not of uniform application. The title of the act is as follows: "An act regulating the filing and foreclosure of mechanic's liens upon lands held or occupied under a filing under any of the land laws of the United States."

The specific objection to the title is that it does not state the fact embodied in the body of the law, that a lien is created in favor of persons furnishing materials for or doing work upon buildings situated upon government lands. The act provides that materialmen and persons doing work upon buildings so situated shall have a lien upon such building, and, after enforcing said lien, may remove the building from the land after a sale thereof on execution. The omission from the title of the fact that a lien is created by the act in favor of such persons is the basis of the contention that the act is unconstitutional and void, as contravening the provisions of section 61, article 2, constitution, which reads as follows: "No bill shall embrace more than one subject which shall be expressed in its title, but a bill which violates this provision shall be invalidated only as to so much thereof as shall not be so expressed in the title." This section of the constitution has been construed by this court in several cases. In those cases several principles have been laid down as guides in the construction of the section that should be applied in this case: (1) The law will not be declared unconstitutional on account of the defect unless it is clearly so. (2) The title should be liberally construed, and not in a strict or technical manner. (3) If the provisions of the act are germane to the expressions of the title, the law will be upheld. (4) The object to be gained by the enactment and enforcement of the constitutional provision is to advise the legislature and the public of the substance of the act and to prevent surprise, fraud and the enactment of laws upon incongruous and independent matters under one title. (5) The section of the constitution is mandatory upon the legislature and upon the courts. *State v. Woodmansee*, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420; *State v. Nomland*, 3 N. D. 427, 57 N. W. 85, 44 Am. St. Rep. 572; *Richard v. Stark County*, 8 N. D. 392, 79 N. W. 863; *State v. Home Society*, 10 N. D. 493, 88 N. W. 273. Liberally construed we agree that the law is germane to and reasonably connected with what is expressed in the title to the act. The necessary implication connected with the idea of the filing and foreclosure of a mechanic's lien is that a lien is given by this law. The creation of a lien is not foreign or independent to the filing or foreclosure thereof. The words "filing and foreclosure," as used in the title, reasonable construed, mean the doing of everything necessary to perfecting the lien, and no lien can be filed or fore-

closed that has not been or is not created by some provision of law, as there is nothing to file or foreclose. The broadest meaning that the words of a title are susceptible of may be given to them, and the law will not be declared invalid because the words are not well selected. The word "filing," as commonly used in reference to liens, indicates the doing of everything essential to perfecting a claim for a lien authorized by law, and not the mere leaving of the affidavit and account in the office of the clerk. The technical meaning of the words of a title should not be taken as limiting the provisions of the law. The choice of the language is a matter of legislative discretion, and courts will not nullify the legislative will because the language is not well chosen, if upon any reasonable view the language express the subject. *Diana Shooting Club v. Lamoreux*, 114 Wis. 44, 89 N. W. 880, 91 Am. St. Rep. 898. A person reading this title would not be justified in assuming that the act did not refer to the giving of a lien. The title suggests that the object of the law was to supplement the existing law relating to mechanics' liens by granting a lien where buildings are erected upon government lands, and authorizing a purchaser at a foreclosure sale to remove it, to obviate the defect in the then existing statutes as construed by this court in *Gull River Lumber Co. v. Briggs*, 9 N. D. 485, 84 N. W. 349. The appellant strongly relies on the case of *State v. Nomland*, supra, but the real point decided in that case is not pertinent to this case. In that case the title in no way suggested the dominion of the law objected to. The case of *Gaines v. Williams*, 146 Ill. 450, 34 N. E. 934, is very much in point. The title of the act was "An act to regulate the foreclosure of chattel mortgages on household goods, wearing apparel and mechanic's tools." The act provided that no chattel mortgage executed by a married man or married woman on household goods should be valid unless joined in by the husband or wife. This provision was objected to as not expressed in the title, but it was held germane to the title under a constitutional provision the same as ours.

The second objection to the law is that it is repugnant to section 11 of article 1 of the constitution, which provides that "all laws of a general nature shall have a uniform operation," and to subdivision 31 of section 69 of article 2, prohibiting the enactment of special laws, "authorizing the creation, extension or impairing of liens." It is claimed that to grant liens on buildings

erected on government lands only is an unconstitutional classification as arbitrarily applying to one class of persons occupying lands without having any title thereto. Persons occupying land under the laws of the United States are not similarly situated with persons occupying other land in expectation of ultimately securing title thereto. In case of entries upon government land, the land is forever exempted from an levy based on a debt contracted prior to the issuing of patent by virtue of the provisions of the federal statute. In view of this fact, occupants of land under the federal law are a class in themselves. This fact is a sufficient basis for the classification made by this law. It is not arbitrary, but is based on a reasonable principle. It is a substantial distinction, and recognizes a class really different from any other. It controverts no rule adopted by this court as to the principles that should underlie a proper classification of persons or subjects to which laws of a general nature shall apply. *Edmonds v. Herbrandson*, 2 N. D. 270, 50 N. W. 970, 14 L. R. A. 725; *Beale v. N. P. Ry. Co.*, 15 N. D. 318, 108 N. W. 33; *Vermont L. & T. Co. v. Whitshed*, 2 N. D. 82, 49 N. W. 318; *State v. Mayo*, 15 N. D. 327, 108 N. W. 36; *Angell v. Cass Co.*, 11 N. D. 265, 91 N. W. 72.

The judgment is affirmed. All concur.

(113 N. W. 703.)

HENRY J. JOHNSON v. COUNTY OF GRAND FORKS, A MUNICIPAL CORPORATION, AND HANS ANDERSON, AS COUNTY AUDITOR OF THE COUNTY OF GRAND FORKS, NORTH DAKOTA.

Opinion filed Nev. 13, 1907.

Primary Election — Qualification of Voters.

1. The primary election established by chapter 109, p. 207, Laws 1905 (section 555, Rev. Codes 1905), is an election within the meaning of section 121 of the constitution, which prescribes the qualifications for voters at "any election."

Same — Ballots — Fee Required of Candidates.

2. It is incompetent for the legislature to require payment of a fee, either by voters or by candidates, as a condition to having the name of a candidate printed on the official primary election ballot provided for under such law, except such as may be a reasonable fee for services of auditor for filing petition.

Same — Qualifications of Voters — Constitutional Law.

3. It is incompetent for the legislature to prescribe qualifications of voters or candidates for office in addition to those fixed in the constitution.

Same.

4. The provision exacting fees for printing the names of candidates on the official primary election ballot required by section 4 (Laws 1905, p. 208, c. 109), of the law above referred to is unconstitutional, as being a qualification of voters and candidates not included in the constitutional requirements, and is an arbitrary, unwarranted, unreasonable, and unnecessary regulation of elections, having no tendency to promote honesty, fairness, or good order in the conduct of elections.

Payment — Protest — Recovery.

5. The plaintiff having paid the fee required by such law and demanded by the county auditor, before he was allowed to file his petition as a candidate, under protest, on the facts disclosed and admitted by the pleadings, an action at law to recover such fee is a proper remedy.

Appeal from District Court, Grand Forks county; *Templeton. J.*

Action by Henry J. Thompson against the county of Grand Forks and Hans Anderson, county auditor. Judgment for defendants. Plaintiff appeals.

Reversed.

Bangs, Cooley & Hamilton, for appellant.

Under section 129 of the constitution the legislature can regulate elections. *Parvin v. Wimberg*, 30 Am. St. 254; *State v. Saxon*, 32 Am. St. 46; *Taylor v. Bleakley*, 49 Am. St. 233; *Talcot v. Philbrick*, 20 Atl. 436; *Atty. General v. City of Detroit*, 44 N. W. 388; *Cooley, Const. Lim.* (6th Ed.) 758.

The constitutional right to vote can neither be enlarged or restricted. *Spier v. Baker*, 52 Pac. 659; 41 L. R. A. 196; *People v. English*, 29 N. E. 678; *McCafferty v. Guyer*, 59 Pa. St. 109; *State v. Findlay*, 19 Pac. 241; *Levisley v. Litchfield*, 83 Pac. 142; *State v. Denoyer*, 6 N. D. 586, 72 N. W. 1014.

Every elector has a constitutional right to become a candidate for office. *State v. Drexel*, 105 N. W. 174.

A primary election is an "election." *Spier v. Baker*, *supra*; *State v. Baker*, *supra*; *People v. Board of Election Commissioners*, 77 N. E. 321; *State v. Scott*, 108 N. W. 828; *State v. Drexel*, *supra*.

J. B. Wineman, for respondent.

A law, otherwise invalid, will be sustained if the party objecting to it has, by prior acts, precluded himself from being heard in opposition. 8 Cyc. 791; *Pierce v. Somerset Railway*, 171 U. S. 641; *State v. Moore*, 92 N. W. 4; *Ferguson v. Landram*, 96 Am. Dec. 350; *Montgomery v. Chelf*, 82 S. W. 388.

Participation in the elective franchise is a privilege, not a right. *Cooley on Con. Lim.* (6th Ed.) 752.

SPALDING, J. This action was brought to recover fees paid by two candidates for nomination for treasurer and one for clerk of court of Grand Forks county at the primary election held on the 19th day of June, 1906. The complaint sets forth the necessary qualifications of the persons affected to entitle them to become candidates for the offices named, and that each presented a petition, complying with all the requirements of chapter 109, page 207, Laws N. D. 1905, known as the "primary election law," to the county auditor of that county, and demanded that their names be printed on one of the ballots to be used at such election as candidates for such offices. The complaint alleges that the county auditor demanded of each of them a fee equal to 2 per cent of the annual salary of the offices to which they respectively aspired, namely, from each of the candidates for treasurer \$48, and from the candidate for clerk of court \$10, and that he refused to print their names on such ballots unless paid such sums; that they paid the amounts demanded to procure their names to be so printed but that they paid the same under protest, and so notified the auditor. No claim is made that he demanded a greater sum than that required by law referred to. Two of the claims were, before this action was brought, assigned to the plaintiff, he being the third candidate. The defendants demurred to the complaint on the ground that it did not state a cause of action against them or either of them. This appeal is from the order sustaining such demurrer, and it raises the question of the constitutionality of those provisions of section 4 of the act in question (section 555, Rev. Codes 1905), requiring candidates for nomination for county and district offices at the primary election to pay certain fees to the county to entitle them to have their names printed on one of the ballots to be used at the primary election.

The fee required of candidates for nomination for county and district offices, except for some of the minor offices, is fixed by that section at 2 per cent of the annual salary of the office, except candidates for the state senate, who are required to pay the sum of \$30, and representatives, the sum of \$10, and candidates for sheriff, who pay the same as those for county auditor. The section referred to also provides that the money so received shall be covered into the general fund of the county. Prior to the enactment of this law, nominations had been made by the caucus and convention system. A caucus held in each precinct in which the voters of a party desired to participate in the nominations of candidates for the various offices at the ensuing election, and delegates were elected to a county or district convention, as the case might be. This county or district convention composed of delegates elected by the various caucuses, made the nominations of candidates, whose names, on being certified to the county auditor by the officers of the convention, were printed as the party nominees to the various offices on the official ballot to be used at the general election. The same system prevailed for the nomination of representatives in congress, judges and state officials, except, as to them, the county convention elected delegates to the state or judicial convention which placed the candidates in nomination for the party. The methods pursued in such caucuses and conventions, it was believed, had become unrepresentative and unfair, if not corrupt, and the people demanded the enactment of a law under which direct nominations could be made, hoping thereby to eliminate many of the abuses which were thought to have become a part of the old system. Chapter 109, Laws 1905, was the result. This provides for the nomination of county and legislative candidates and the election of delegates to state conventions at a primary election to be held in June of each year at which a general election may occur. The objects of this chapter, though we think not of the provisions complained of in this action, were sought to be stated in the first section, which says: "It is the intention of this act to purify and reform the methods by which organized political parties shall make nominations of candidates for the several public offices, to perpetuate and strengthen political parties by eliminating therefrom the evils hereby sought to be corrected, and to secure each individual member and delegate of such party an absolute freedom and independence in the expression of his preferences relating to nomi-

nations by such parties and to prevent and prohibit the use and influence of methods, similar to that known as the unit rule, and this statute shall be so construed as to give force and effect to this expressed intention."

In trying to arrive at a decision of the questions at issue, it may be well to consider some of the principles underlying a republican form of government, and particularly those principles recognized by the people of this state in the organic law which they enacted, and which must serve as a guide, not only to them, but to their representatives and agents in the legislative, executive and judicial departments of the state. This law is the warrant under which they all act, and to the legislative department it is a limitation of authority. In determining its scope and meaning it often becomes necessary to consider what its terms imply, as well as what it says. Even if an act is not prohibited by the strict letter, it may still conflict with the objects sought to be attained, as gathered from the whole instrument in connection with a study of contemporaneous history. If so, it is equally as invalid as though the conflict was in express terms. In a republic the people are sovereign. They express this sovereignty through the ballot, by means of which they select their agents by whom it is exercised. The elective franchise is the most valuable right of the American citizen, and should be most sacredly treasured by them and as sacredly protected by the courts. The acts of the lawmakers are the acts of the people themselves, except as they may conflict with the limitations prescribed in the constitution, or necessarily implied from its language and purpose. The constitution prescribes the qualifications and requisites to entitle a resident or citizen of the state to use the franchise. Sections 121 and 127 define these qualifications in the following language: Section 121: "Every male person of the age of twenty-one years or upwards belonging to either of the following classes, who shall have resided in this state one year, and in the county six months, and in the precinct ninety days next preceding any election, shall be a qualified elector at such election: First. Citizens of the United States. Second. Civilized persons of Indian descent who shall have severed their tribal relations two years next preceding next election." Section 127: "No person who is under guardianship, non compos mentis, or insane, shall be qualified to vote at any election; nor any persons convicted of treason

or felony unless restored to civil rights; and the legislature shall by law establish an educational test as a qualification, and may prescribe penalties for failing, neglecting or refusing to vote at a general election." The provisions of the constitution are mandatory and prohibitive, unless by express words they are declared to be otherwise. Const., section 121. It is unquestioned that the legislature can neither enlarge nor diminish the qualifications necessary to entitle one to vote at a constitutional election. It cannot add to the term of residence required, either in the state, county or precinct; neither can it lessen either of these periods, nor by creating classes of voters deprive one qualified under the constitution from voting, or make one a voter not so made by such provision. The people in adopting the constitution containing these provisions recognized the necessity of stability and uniformity in such qualifications, and thereby protected all citizens from being subjected to the uncertainty which would arise if the standard of citizenship and qualifications for voting were left to the whims and caprice of the different legislative assemblies, governed, as they might be, by varying purposes and ideals. The legislature cannot prescribe a property qualification as a prerequisite to being allowed to vote. It cannot require a voter to pay a sum of money to any officer or to any department of government before he can vote. The standard by which his rights must be measured are fixed by the constitution. *Spier v. Baker*, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196; *People v. English*, 139 Ill. 622, 29 N. E. 678, 15 L. R. A. 131; *McCafferty v. Guyer*, 59 Pa. 109; *State v. Findlay*, 20 Nev. 198, 19 Pac. 241, 19 Am. St. Rep. 346; *Livesley v. Litchfield*, 47 Or. 248, 83 Pac. 142, 114 Am. St. Rep. 920; *Cooley Const. Lim.* (6th Ed.) p. 753. In *Spier v. Baker*, *supra*, the Supreme Court of California, in considering the primary election law of that state adopted in 1897, said: "The legislature has no power to deprive any citizen of the state who fills all the requirements demanded by the section of the constitution quoted from voting at an election provided for by this act. In this country the right to vote is recognized as one of the highest privileges of the citizen. It is so recognized, not only by the citizen, but by the law; and any infringement by legislative power upon that right as granted by the constitution is idle legislation. If the legislature has by this act deprived citizens of the right to participate in the elections therein provided who are qualified to participate under the constitution

—aye, even if the legislature has deprived one citizen so qualified of such right—the act is void, as an attempted exercise of power it does not possess.” This must not, however, be construed to mean that the legislature has no right to prescribe reasonable rules and regulations by which the conduct of elections shall be governed in the interest of good order, fairness and honesty. The legislature has the right to make any reasonable regulations to prevent fraud in the conduct of elections, voting by persons not qualified under the constitution, and for the speedy conduct of the business incident to elections. The question for courts to determine is whether they go beyond the bounds of reason, and whether they place any restrictions around the exercise of the right of suffrage which limits it arbitrarily or unnecessarily.

It is contended that the primary election authorized by the law under consideration is not such an election as was contemplated by the framers of the constitution. In other words, that it is not a constitutional election, and that, therefore, it is not governed by the constitutional limitations. We cannot agree with this contention. Section 121 of the constitution prescribes the qualifications for voters at “any election.” It is true that at the time of the adoption of the constitution a primary election law was unknown in this state, but constitution makers are not presumed to foresee and take into consideration every new condition which may arise or every new remedy which may be devised for application to old conditions. Constitutions do not deal in details. They comprise general principles and general directions which are intended to apply to all new facts and conditions which may come into being, and which may be brought within the terms of these general principles or directions, and, when the constitution says “any election,” in prescribing the qualifications of voters, it does not mean simply any election then known to the people of the state. It means, not only any election then provided for by the laws and constitution, but any election which may thereafter be established or required to be held pursuant to law. This principle has been recognized by numerous courts. The constitution of the state of California provides the qualifications necessary to entitle a person to vote at elections “authorized by law,” and in *Spier v. Baker*, *supra*, the court holds that primary elections thereafter provided for are elections “authorized by law,” and says that any infringement by the legislative power upon the right to vote as granted by

the constitution is idle legislation, and that any attempt of this kind is an exercise of power it does not possess. In the same case the court says: "It must be an election under this provision of the constitution, or the legislature would have no power to provide that money should be taken from the state and county treasuries to pay the expenses of conducting it. The validity of any taxation looking towards the raising of money for such purposes would be absolutely void if the elections provided for by the act are not elections recognized by and referred to in this constitutional provision. These things being true, the legislature has no power to deprive any citizen of the state who fills all the requirements demanded by the section of the constitution quoted from voting at an election provided for by this act." In *People v. Board of Election Commissioners of Chicago*, 221 Ill. 9, 77 N. E. 321, the Supreme Court of Illinois held that, although at the time the constitution was adopted primary elections as such were not within the contemplation of the convention or the people and had not been made a part of the election system, yet that the primary election subsequently provided for by the law was an election within the meaning of that word as used in the constitution. To same effect, see *Leonard v. Commonwealth*, 112 Pa. 607, 4 Atl. 220.

Two methods are recognized by which persons may become candidates for office. In popular parlance they are distinguished as the "man seeking the office," and the "office seeking the man." Under this provision of the primary election law, it may be presumed that the man seeking the office will first provide the necessary means with which to pay the fee required. But what if the office seeks the man, and the man whom the people demand is inactive or indifferent and either unable or unwilling to pay the fee? It necessarily follows, if the voters are entitled to exercise their privilege of placing a man in nomination who declines to be an active candidate or to pay the fee, that they themselves must contribute the amount necessary to secure his recognition as a candidate for nomination under this law, and it seems clear that such a necessity imposes upon the voters a burden not contemplated or permitted by the constitution. It may be answered that it is unnecessary that the name of a candidate be printed on the ballot, that provision is made and a space left in which the name can be written, and that by means of this provision, each voter is left free to express his choice. Abstractly considered, this is true,

but in the practical operation of the system it is false. We all know that the candidate whose name is printed on the official ballot is the only one who, under any ordinary circumstances, can be successful in a state whose boundaries are as extended as those of this state, and whose population is as sparse. Necessarily the people of one part of the state are strangers to those of another part; the issue which may be thought paramount in one part of the state may be unfamiliar to the voters in a remote part, and to secure the co-operation necessary to make the candidacy of any person whose name is not printed on the ballot used in all parts of the state successful, or even to secure his recognition in a small way, is utterly impracticable. So, to all ordinary intents, and in all except extraordinary emergencies, this provision is valueless.

Of course, we have discussed this not solely with reference to the county or district, but with reference to the general principles involved, as it is general principles that must govern. While this law only applies to counties and districts, similar provisions and requirements have now been made applicable to the nomination of state officials. The same principles which apply to the qualifications of a voter are also applicable to those of a candidate. In a general way, the qualifications required of candidates for office are the same as those for voters. The constitution makes some exceptions by prescribing that some officials shall be of greater age than 21 years, or that they shall have resided in the state a longer period than is necessary to qualify them to vote, or that they shall be members of a certain profession, but these are qualifications deemed essential to fit a person for a particular office, and do not affect the general principle; namely, that the legislature can neither increase or diminish the qualifications fixed by the constitution for holding office. The rule is that, when the constitution of a state has prescribed qualifications for voters and defined the qualifications of an officer, it is not competent for the legislature to add to or in any way alter such prescribed and defined qualifications, unless the power to do so is expressly or by necessary implication conferred upon it by the constitution itself. *McCrary on Elections* (2d Ed.) sections 72-226-252; *U. S. v. Slater* (C. C.) 6 Fed. 824, 4 Woods, 356; *Rison v. Farr*, 24 Ark. 161, 87 Am. Dec. 52; *Quinn v. State*, 35 Ind. 485, 9 Am. Rep. 754; *Blair v. Ridgely*, 41 Mo. 63, 97 Am. Dec. 248, and cases cited in note 1; *Spier v. Baker*, *supra*; *People v. Board*,

supra; *State v. Stafford*, 120 Wis. 203, 97 N. W. 921, 1043; *State v. Drexel* (Neb.) 105 N. W. 174; *State v. Holman et al.*, 58 Minn. 219, 59 N. W. 1006; *Thomas v. Owens*, 4 Md. 189; *Dapper v. Smith*, 138 Mich. 104, 101 N. W. 60.

It cannot be contended that the payment of this fee has any tendency to prevent fraud or that it is conducive to orderly elections, but it is argued that the requirement is not unreasonable. The constitution requires no fee. If we once admit the power of the legislature to make even the smallest additions not contemplated by the constitution to the qualifications required to entitle one to vote, there is no limit to the requirements which may be added. What then, was the object of this requirement? We can discover none unless it was to prevent a multiplicity of candidates. But this object is something beyond the purview of legitimate legislation. It might be asked if we were to consider the policy of the legislation, whether it would not be the part of wisdom to encourage an increase in the number of candidates for the different offices, rather than to restrain the people from becoming candidates? The greater number of candidates the greater variety of choice presented to the individual voter, and the more probable becomes the selection of those best fitted for representative positions. This election is intended as a party election. It takes the place of party conventions, and no provision is made for any except those candidates representing parties. The plain spirit of our system is to make it easy for voters to make their choice; and to this end that every aggregation of voters representing a party or principle shall have the opportunity for representation on the official ballot. We are of the opinion that the legislature has no power to pass any law having for its purpose the restriction or limitation of the number of candidates who have otherwise qualified to hold office. If the fee as fixed is to stand, the practical working of the law is to discourage and possibly eliminate all party effort, except on the part of the majority party. In a county, district or state in which from 65 per cent to 80 per cent of the voters affiliate with one party few candidates of minority parties can be expected to make the payment required. The legislature might with greater propriety and fairness have limited it to the dominant party. It is a practical prohibition on all voters of the minority party participating in the primaries as members of such parties. "Active political parties, parties in opposition to the dominant po-

litical party, are, as has been said, essential to the very existence of our government. The right of any party of men holding common political beliefs, or governmental principles, to advocate their views through party organization, cannot be denied. * * * The law which will destroy such party organization or permit it fraudulently to pass into the hands of its enemies cannot be upheld. The procedure of political parties may be regulated, and the wisdom of the legislature may well be exercised in devising methods to check political corruption and fraud, but the legislature itself under the guise of regulation cannot be permitted to throw open the doors to these very abuses." *Britton v. Board of Commissioners*, 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115; Mr. Wigmore, at page 54 of his work on the Australian Ballot System, says: "But it is to be remembered that in this country a candidacy may be hopeless as regards the election of the nominee, and yet important and highly desirable as a means of exhibiting the strength of a section of electors or of a particular movement, and, of course, compelling the attention of the leading parties, and the modification of their platforms and legislative policies. "It will be seen, therefore, that the plan of requiring a reasonable deposit is not adapted to our political methods, and that its adoption would be ill advised." We are of the opinion that the constitutional provisions are not only applicable to primary elections provided for and required to be held as elections, but that they are applicable to them as steps looking toward the election of officials. It would be the greatest folly to prescribe qualifications for voters and candidates at the general election, and then let down the bars or make greater restrictions applicable to voters in the selection of candidates to be voted for at such election. The caucus and the primary are at a foundation of the elective system. If anybody can vote regardless of constitutional restrictions at the primary, or if the legislature can increase the qualifications of voters or candidates at a primary, the constitutional restrictions applicable to voters and candidates at the general election have no meaning. We read in the words of the constitution what are the tests of a legal voter at a general election; but of what avail is the express language of that instrument on that subject if the legislature may nevertheless fix other and different tests before one can take the first steps necessary to enable him to take part in that election? The plain implication is that nowhere on

the way to the general election can additional tests be required. It is said in *People v. Board of Election Commissioners of Chicago*, that "every eligible person has a right to be a candidate for office without being subject to unreasonable burdens. The voters have a right to choose any eligible person, and he owes a duty to the public to qualify and serve;" and again: "There can be no discrimination between candidates based on the ground that one has money and chooses to pay for the privilege of being a candidate, and the other has no money or is unwilling to pay for being a candidate." See, also, *People v. Williams*, 145 Ill. 573, 33 N. E. 849, 24 L. R. A. 492, 36 Am. St. Rep. 514. If the legislature can require the candidate to buy his way to office, it simply lends the legislative sanction to an additional means of corruption quite as vicious in principle as any which the primary law was intended to correct. Section 127 of the constitution permits the legislature to prescribe penalties for failing, refusing or neglecting to vote. If the law under consideration is valid, it becomes possible for the legislature to penalize both for failing to vote and for voting.

The Supreme Courts of Illinois and Nebraska, in addition to the quotations already made, have given additional reasons for their invalidity, which we must notice and approve as applicable to the law in question. In 1901 the legislature of Illinois enacted a primary election law by which any one desiring to become a candidate for governor, United States senator, or congress was required to pay a fee of \$100, and each candidate for state senator \$50, and for member of the house of representatives, \$25; and in considering the constitutionality of that requirement, that court said: "These payments bear no relation to the services rendered in filing the papers or the expenses of the election. They are purely arbitrary exactions of money to be paid into the public treasury as a monetary consideration for being permitted to be a candidate. The payments are not intended to be a compensation for filing papers;" and held requirements as to fees unconstitutional. *People v. Board*, *supra*. The legislature of Nebraska in 1905 also provided a primary election law, and in relation to the payment of fees required of candidates (1 per cent of the emoluments of the term) that court said: "It is to be observed that the amount thus required to be paid before one can have his name submitted to the voters at the primary is fixed arbitrarily, and wholly re-

gardless of the services performed in filing nomination papers. A person aspiring to be nominated for clerk of the district court would be required to pay perhaps \$200, a candidate for the nomination of county clerk probably \$10; other candidates for county office different sums, ranging between the two extremes. Is it competent for the legislature to impose burdens of this character on those desiring to become candidates for public offices, the nominations for which come within the provisions of the primary election law? Can a test of ability to pay fees of the magnitude mentioned be made as to one's right to be voted for at a primary election? It is at first glance apparent that these enormous fees prevent many from becoming candidates for party recognition who otherwise would be willing to yield to a public demand that they become candidates for public office. It is said the fees required to be paid in the manner stated are for the purpose of defraying the expenses of the primary. It is not so stated in the act. It is expressly provided the expenses of the primary are to be paid out of the public treasury. It is not, therefore, required of us to pass upon the question of the power of the legislature to require those submitting their names to be voted for at a primary to pay the expenses of the election. It appears from the act itself that there is no relation between the charges made for filing nomination papers as therein provided and the expenses incident to a primary election, nor to the value of the services in filing the nomination papers. The charges are arbitrary and unreasonable. They make the pecuniary ability of the person to pay the same a test as to his qualification to become a candidate for party nomination. The law is as objectionable as if the test was based on a property qualification or the amount the elector had contributed to the public revenues. The primary election contemplated in the act may not in and of itself be an election within the meaning of the constitutional provisions, which guarantee that "all elections shall be free," and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise. Section 22, article 1, Const. It is, however, a means to an end. It is a part of the election machinery by which it is determined who shall be permitted to have their names appear on the official ballot as candidates for public office." "To say that the voters are free to exercise the elective franchise at a general election for nominees in the choice of which unwarranted restrictions and hindrances were in-

terposed would be hollow mockery. The right to freely choose candidates for public office is as valuable as the right to vote for them after they are chosen." *State v. Drexel*, *supra*. The Supreme Court of Minnesota in *State v. Scott*, 99 Minn. 145, 108 N. W. 828, in passing on the provisions of the primary election law of that state, which require the payment of a fee of \$20 when the petition of the candidate is required to be filed with the secretary of state, and \$10 when filed with the county auditor, referring to the Nebraska and Illinois cases cited, apparently approves of those decisions as applied to the fees required by the laws of those states, for it says. "We need not deny that both acts were arbitrary and unreasonable in the exaction of fees;" but held that the fee of \$20 or \$10 required by the Minnesota law was not an unreasonable regulation.

It is insisted that the reasons for the Illinois and Nebraska decisions do not apply in this state, because our law requires a space on the official ballot for writing additional names of candidates which was not provided for in one of those states, and for the further reason that our constitution carries no requirement that all elections shall be free and equal. We are, however, satisfied that neither of such distinctions affects the principles involved, and think they need no answer in addition to what we have hereinbefore given. We may add that courts hold that the expression "free and equal" has no reference to payment of fees. For these reasons we think the provisions of the law in question attacked in this action are invalid, and so hold.

The respondents argue that the appellant should have applied to the court for a writ of mandamus to compel the auditor to cause his name to be printed upon the ballot without the payment of a fee, and that, by failing to do so, he waived his right to question the constitutionality of the act. A discussion of this proposition is unnecessary, because the plaintiff alleged in his complaint that there was insufficient time before said primary election for the candidates named in the complaint to institute an action or any special proceedings, either at law or otherwise, for the purpose of compelling the county auditor to place their names upon the ballot, and that they were compelled by reason of this fact to make the payments demanded. The defendants by demurrer to the complaint admitted this allegation and the case comes to this court on the pleadings, and we are precluded from inquiring into the facts

further than is admitted by the demurrer of the defendants. We must take such admissions as true. We must, therefore, hold that the procedure adopted in this case was proper. Lest this opinion be misconstrued, we add that it applies to no part of the act referred to, except that requiring the payment of a fee.

The district court erred in sustaining the defendant's demurrer, and its order doing so is reversed. All concur.

(113 N. W. 1071.)

JAMES T. MORRISON v. P. P. LEE.

Opinion filed Nov. 15, 1907.

Contributory Negligence.

1. Defendant sold to plaintiff a gallon of kerosene, with knowledge of the fact that one-ninth part thereof was gasoline. Plaintiff, with knowledge of the fact that a fire was burning in his stove, poured some of the contents of the mixture directly from the can into the stove, causing an explosion of the vapors in the can, which severely injured him. *Held*, assuming that the oil was standard kerosene, that plaintiff as a matter of law was guilty of negligence which proximately contributed to the injury, and hence he cannot recover.

Same — Fact of Negligence Undisputed — Question for Court.

2. When the facts relating to negligence or contributory negligence are not in dispute, and but one inference can reasonably be deduced therefrom, the question of negligence or contributory negligence becomes a question of law for the court.

Same — Due Care.

3. The standard from which to determine the question as to whether the plaintiff exercised such care as a reasonably prudent person would exercise under the like circumstances is the common knowledge and experience of men, and not the scientific knowledge and experience possessed by experts.

Appeal from District Court, Ward county: *Goss*, J.

Action by James T. Morrison against P. O. Lee. Judgment for plaintiff, and defendant appeals.

Reversed.

James Johnson and *Guy C. H. Corliss*, for appellant.

Where the negligence is violation of statutory or municipal law, proximate cause must be shown. 21 Am. & Eng. Enc. Law, 480; 1 Sher. & Redf. Neg. 27; 1 Thompson on Negligence, 210.

Negligence must be sole cause of injury. *Elliott v. Allegheny, etc., Co.*, 54 Atl. 278; *Afflick v. Bates*, 43 Atl. 539; *The Saratoga* 36 C. C. A. 208; *Loftus v. Dehail*, 65 Pac. 379; *Rider v. Syracuse, etc., Co.*, 63 N. E. 836; *Thompson on Negligence*, 145; *France v. Head*, 42 S. W. 913; *Laidlaw v. Sage*, 52 N. E. 679; *Louisville Gas. Co. v. Kaufman*, 48 S. W. 434.

When, between defendant's act and plaintiff's injury, a third cause intervenes, defendant's act is the remote, not direct cause of the injury. *Stone v. Boston, etc., Ry. Co.*, 51 N. E. 1, 21 Am. & Eng. Enc. Law, 489; 1 *Thompson on Negligence*, 57; *Sheridan v. Bigelow*, 67 N. W. 732; *Deisenrieter v. Kraus-Merkel Malting Co.*, 72 N. W. 735; *Cole v. Ger. S. & L. Soc.*, 124 Fed. 113; *Laidlaw v. Sage*, *supra*; *Cochran v. Railway Co.*, 39 Atl. 296; *Koch v. Fox*, 75 N. Y. Supp. 913; *Niles v. Ry. Co.*, 43 N. Y. Supp. 751; *Mo. Pac. Ry. Co. v. Columbia*, 69 Pac. 338; *Chicago, etc., Ry. Co. v. Harton*, 81 S. W. 1236; *Glassey v. Worcester, etc., Co.*, 70 N. E. 199; *Leeds v. N. Y. Tel. Co.*, 70 N. E. 219; *Claypool v. Wigmore*, 71 N. E. 509; *McFarlane v. Town of Sullivan*, 74 N. W. 559; *Strobeck v. Bren*, 101 N. W. 795; *Fishburn v. Burlington & N. W. Ry. Co.*, 98 N. W. 380; *Kingsley v. Bloomingdale*, 67 N. E. 333.

LcSucuer & Bradford (*Tracy R. Bangs*, of counsel), for respondent.

The question of negligence was for the jury. *Vindicator Consol Min. Co. v. Firstbrook*, 86 Pac. 313; *Fernandez v. Sac City Ry.*, 52 Cal. 45; *Schubert v. Clarke*, 15 L. R. A. 818; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Fuchs v. St. Louis*, 34 L. R. A. 118; *Hourigan v. Nowell*, 110 Mass. 470; *Siemers v. Eisen*, 54 Cal. 418; *Ives v. Welden*, 54 L. R. A. 854.

Court must assume that plaintiff is not negligent. *Smith v. Chicago Ry. Co.*, 55 N. W. 717; *Kelly v. Anderson*, 87 N. W. 579.

FISK, J On February 6, 1906, plaintiff recovered a judgment against the defendant in the district court of Ward county in the sum of \$8,023 for alleged negligence in selling to plaintiff a gallon of kerosene oil containing a small quantity of gasoline, which

mixture, or, more properly speaking, the vapors formed therefrom, exploded in the can in which the same was contained while plaintiff was in the act of starting a fire, causing him serious bodily injury. The case was before this court on a former appeal, but the merits of the litigation were not considered or decided; the decision being based upon a question of practice. See *Morrison v. Lee*, 13 N. D. 591, 102 N. W. 223.

Plaintiff's cause of action is predicated upon the negligent and unlawful conduct of defendant in selling what plaintiff had a right to assume was standard kerosene, when the same contained a mixture of kerosene and gasoline; the evidence showing that the mixture contained eight parts of standard kerosene and one part gasoline. The defendant is clearly liable, under all the authorities, for the injury caused by the explosion, provided the proof shows that the proximate or efficient cause of such explosion was the presence of the gasoline in the oil, and that plaintiff did not by his culpable negligence directly contribute to such injuries. We therefore start with the assumption, which we think is too plain for discussion, that defendant was guilty of gross negligence as a matter of law in placing this mixture upon the market for sale to his customers, especially without acquainting them of its true character. It does not follow, however, that this negligence on defendant's part was actionable unless it affirmatively appears that it operated to cause injury to some one; and the person asserting that it did cause injury has, of course, the burden of showing such fact. *Waters-Pierce, etc., Oil Co. v. Deselms* (Okl.) 89 Pac. 212. Applying this rule to the case before us, the burden was upon plaintiff to establish by a fair preponderance of the evidence that this explosion and consequent injury would not have happened under the facts in this case had it not been for the presence of the gasoline in the oil. Plaintiff concedes this burden to be upon him, but he most vigorously contends that the trial court under the state of the proof, was justified in submitting this question to the jury. Even if this contention were sound, we would be unable to see how the instruction of the trial court upon this issue could be upheld. Question 28 of the special verdict embodied this issue as follows: "Would an explosion have resulted in the oil can if the oil poured by plaintiff the second time in his stove had been kerosene oil of standard test, when measured by flash test at 120 degrees Fahrenheit?" The burden was upon the plaintiff to estab-

lish the negative of this issue, but the court charged the jury with reference thereto as follows: "Before you answer question No. 28. the evidence in this case must show by a fair preponderance of the evidence that an explosion would have resulted in the oil can if the oil poured by plaintiff the second time in the stove had been kerosene oil of standard test, when measured by flash test at 120 degrees Fahrenheit. Should the evidence fail to prove by a fair preponderance thereof that said explosion would have resulted had the oil so poured the second time into this stove by plaintiff been kerosene oil of standard test, * * * then your answer to this question should be 'No,' or in the negative." This instruction was clearly erroneous. This is a question, however, not involving the merits, and, if we can do so, we deem it only justice to both parties to dispose of this appeal upon the merits, and thus end a long drawn out and necessarily expensive litigation.

Whether plaintiff's contention that there was sufficient evidence to warrant the submission of the case to the jury upon the question as to the presence of the gasoline in the oil being the proximate cause of the explosion is sound, it is unnecessary for us to determine, as we are fully convinced that plaintiff's own voluntary and reckless conduct as detailed by his own testimony stands as an insurmountable barrier to his recovery in this action; and, while we regret that defendant is to escape all liability for his gross misconduct, we consider it our plain duty, under the facts, to hold against the plaintiff. In narrating the facts immediately connected with the explosion, plaintiff testified: "I went in the shop on the morning of December 9, 1902, I think about 10 or 11 o'clock in the forenoon, and had some work to do there, so I went to the stove and opened it, and I saw some unburned coal in the stove, saw it was black, and I supposed the fire was out, so I thought if I would put some oil on this coal I could light it, and I took the oil can and started to pour oil in, and the fire flashed up and started to burn, and that surprised me and I hesitated, straightened the can up and held it back for an instant, so then I thought it was blazing. I thought it was safe, and I started to pour, and when I started the second time the can exploded. After I had opened these doors I saw there was no fire in view, so I took the can and poured some oil on it. Q. What precautions did you take besides looking into the stove to see if there was any fire there or not. A. None in particular, except the door was cold

when I took hold of it. The lower draft seemed cold. * * * I picked up the can, and started to pour the oil into the stove out of the can; poured it from the spout. The oil flowed freely from the can. There was a screw top on that can. It was loose at the time I poured the oil on the fire, so the air could flow freely in the top as the oil flowed out the spout. After I had poured in this little the first time the fire flared up, and started to burn. It burned up fairly well; a bright flame. There wasn't any explosion there that time. The flame burned up rather quick, started with a slight flash, and burned up quick. Q. And it burned up as though this oil was all taking fire and burning? A. I suppose so; yes. When I discovered this flame flashing up, I straightened the can up and stopped pouring for the present; straightened it up to an upright position, and moved it back from the opening and tipped the top back. I was still holding the bail of the can in my left hand the bottom in my right. After I hesitated an instant I started to pour again. * * * There were flames there when I poured the second time. Q. Were you not also asked the following question in that same action (meaning the former trial): 'Q. Did it seem to rise up towards the can? A. It rose towards it; yes.' A. The flames were coming up, of course." This testimony, coming as it does, from plaintiff's own lips, must be accepted as a true statement of the circumstances surrounding the injury, especially as he was the only person present at the time of the explosion. It thus appears that at the time of the explosion plaintiff was in the act of pouring this oil from the can into the stove with knowledge that there was a fire blazing therein. If the explosion had occurred while he was in the act of pouring the oil into the stove the first time, it is quite probable that, under the circumstances disclosed by the evidence, we should be obliged to hold it not error to submit the question of plaintiff's due care to the jury; but, where the facts are undisputed and but one inference can be drawn from such facts, it requires us to determine the question as a matter of law, and we feel compelled to hold that in pouring the oil into the stove the second time, knowing that a fire was burning therein, plaintiff was guilty of gross carelessness, which, at least, directly contributed to the injury, if it was not the sole proximate cause thereof.

We have been unable to find any adjudicated case, and none has been cited by counsel for respondent, which has upheld a recovery

under facts similar to the undisputed facts of this case. Counsel for respondent have called our attention to the cases of *Ellis v. Republic Oil Co.* (Iowa) 110 N. W. 20; *Waters-Pierce Oil Co. v. Deselms* (Okla.) 89 Pac. 212, and *Price v. Standard Life & Accident Ins. Co.*, 92 Minn. 238, 99 N. W. 887, as authorities in favor of their contention that the question was one for the jury, and not for the court, to decide. None of them support respondent's theory, but, on the contrary, are in appellant's favor as we construe the opinions. In the first case there was no witness to the explosion, and therefore not the slightest evidence was produced bearing upon the contributory negligence of the deceased, and the court very properly held that plaintiff was entitled to the usual presumption that the deceased was acting with due care prompted by the instinct of self-preservation. There was no evidence tending to show that the deceased had poured the oil out of the can into the fire. The verdict was sustained upon the ground that the evidence tended to show that the explosion was caused by the room becoming filled with gasoline vapors from the can so that, when a match was lighted, an explosion immediately resulted from the explosive mixture of the air and gasoline vapors in the room. The court, after reviewing the testimony, said: "If this be true, it is quite certain that the explosion was not occasioned by oil or gasoline turned into the stove, and ignited by fire smouldering in the ashes or by a match applied to the saturated kindling, for, had it been so produced, it is hardly possible that the stove lids would not have been thrown off, or that the kindling would have been scattered or burned. The more natural inference would seem to be that the air of the room had in some manner become so impregnated with gas or vapor from the contents of the can that explosion followed immediately upon striking the match, and before the girl had time to reach the kindling. In the absence of any showing or suggestion that she was in any manner responsible for the character of the contents of the oil can, or that any reason existed to excite her suspicion that the can was not filled with standard kerosene, there is certainly no showing on which we can say as a matter of law that she was guilty of contributory negligence. The use of kerosene in kindling fires is too common and too well known for us to say that a person using reasonable care may not employ that agency without being charged with negligence. It is said in argument that this may be true, and yet the court should hold it negli-

gent to pour oil directly from the can into a stove in which there is, or may be, fire. But it is not conceded, nor is it shown beyond question, that such was the manner of the accident. The only evidence of that nature is given by one witness who claims to repeat what the girl said in the interval between her injury and her death, three or four hours later. The story told by other witnesses, if credible, casts doubt upon this testimony, and the tendency of other proved circumstances is, as we have seen, opposed to this theory." It will be seen that there was at least a conflict in the testimony as to whether the explosion was caused by pouring the oil into the stove, and it was properly held a question for the jury to determine. It is quite apparent from a reading of the opinion that the recovery would not have been sustained had the undisputed evidence been the same as in the case at bar. In the second case cited the question of contributory negligence was disposed of on the ground that there was no evidence to show that the explosion occurred from pouring the oil on the fire, and the only evidence as to the cause of the fire negatived the idea that the explosion occurred while the oil was being poured from the can into the fire. The evidence showed that there was no fire whatever in the stove when a witness who testified on the trial left the house at 8 o'clock in the morning. Furthermore, after the fire was extinguished, the can was discovered sitting in the room with the top of the can off. This upright position of the can sitting on the floor was evidence that there was no explosion in the can. The evidence indicated that there was an explosion either in the stove from lighting the kindling after the oil had been placed thereon, or from the mixture of air and gasoline vapor in the room. There being no direct or circumstantial evidence showing that the can exploded while the oil was being poured out of it into the fire, and the circumstances indicating the contrary, the court, on the question of negligence, very properly gave the injured party the benefit of the presumption of due care prompted by the instinct of self-preservation. *Price v. Standard Life Ins. Co.*, *supra*, was an action to recover under a policy of accident insurance which limited recovery to one-fifth of the face of the policy "in the event of death * * * due to unnecessary exposure to obvious risk of injury or obvious danger." The insured met his death by an explosion while kindling a fire in a stove by the use of kerosene. The defense urged that, under the above provision of the policy, only one-fifth of its face could

be recovered by the beneficiary. The trial court was asked, but refused, to charge the jury that no recovery could be had in excess of that amount; but did charge in effect to return a verdict only for such sum if the assured knew, or could have known by the exercise of reasonable diligence, that there was fire in the stove at the time he poured kerosene oil therein. This was sustained as a correct statement of law. There was a conflict in the evidence in that case as to the vital question whether the deceased at the time of pouring the oil into the stove knew, or by the exercise of reasonable diligence could have known, that there was fire therein, and for this reason it was held proper to submit the question of due care of deceased to the jury. It is apparent, that, if the evidence had been undisputed that deceased knew of the fire in the stove when he poured the kerosene therein, the court would have held as a matter of law that the recovery could not exceed one-fifth of the face of the policy. It appears, therefore, that these cases do not sustain respondent's contention in the case at bar, but, on the contrary, tend to uphold the contention of appellant.

Respondent cites, as sustaining his contention that it was a question for the jury as to whether he was in the exercise of due care, the following cases: *Milling Co. v. Firstbrook* (Colo.) 86 Pac. 313; *Fernandes v. Sacramento City Ry.*, 52 Cal. 45; *Schubert v. Clarke*, 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. Rep. 559; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Fuchs v. St. Louis*, 133 Mo. 168, 31 S. W. 115, 34 S. W. 508, 34 L. R. A. 118; *Hourigan v. Nowell*, 110 Mass. 470; *Siemers v. Eisen*, 54 Cal. 419; *Clements v. Electric Light Co.*, 44 La. Ann. 692, 11 South. 151, 16 L. R. A. 43, 32 Am. St. Rep. 348; *Jennie Ives v. Weldon*, 114 Iowa, 476, 87 N. W. 408, 54 L. R. A. 854, 89 Am. St. Rep. 379; *Stowell v. Standard Oil Co.*, 139 Mich. 18, 102 N. W. 227. We have examined each of these cases, and none of them throws any light upon the question here involved. The case in 110 Mass. 470, principally relied upon, does not contain a statement as to how the explosion occurred or what the plaintiff's conduct was. In none of the cases, so far as we recollect, was the question of plaintiff's contributory negligence or the question as to whether there was sufficient evidence to require a submission of the case to the jury, involved.

But respondent relies upon the testimony of the witness Bedford, an expert chemist, as showing that an explosion would not

have taken place if it had been standard kerosene in the can, and hence concludes therefrom that plaintiff's act could not be considered negligent as a matter of law. This contention is, we think, untenable. Even if the expert testimony was admissible for any purpose, it merely tended to show that the explosion might not have happened if the oil had been standard kerosene, even though plaintiff was careless in pouring it out of the can onto a blazing fire, as he testified doing. This testimony was entitled to no probative weight as establishing that defendant's negligent act was the sole proximate cause of plaintiff's injury. With equal propriety, defendant might contend that the explosion would not have happened if plaintiff had not carelessly poured the oil from the can onto the fire, even though he, the defendant, was negligent in selling the mixture. The most that can be claimed is that the negligence of the defendant concurred with that of plaintiff in causing the injury. Without the negligence of both parties, the accident might not have happened, hence the proximate cause of the injury was the combined negligence of both parties, according to the testimony of the expert Bedford. The testimony of the experts, therefore, furnishes no light upon the vital question, which is as to whether, under the undisputed facts, plaintiff acted as a reasonably prudent person would be expected to act under the like circumstances. This question should be determined, not from the standpoint of an expert possessing scientific knowledge, but rather from the common knowledge and experience of men. Applying the well-established rule that, where there is no substantial conflict in the testimony and reasonable and fair-minded men cannot differ as to the inferences to be drawn from such testimony, it becomes a question of law for the court, it seems plain that but one conclusion can be reached, and that is that plaintiff did not act with such care as a reasonably prudent person would exercise under the like circumstances, but, on the contrary, his conduct was grossly careless and extremely reckless as compared with that of a reasonably careful and prudent person. The recent case of *Riggs v. Standard Oil Co.*, decided by the Circuit Court of the United States for the District of Minnesota, and reported in 130 Fed. 199, is directly in point. The opinion by Lochren, J., contains a very clear, and we think, sound statement of the law upon the question here involved. As in this case, the plaintiff sought to recover damages for injuries sustained by reason of an explosion

of oil used by her in lighting a fire, she claiming that the oil was a mixture of kerosene and gasoline, although purchased for standard kerosene. The court, after reviewing the facts and after announcing the rule of law applicable to contributory negligence, held that the nature of petroleum oils of all kinds, including that of kerosene, is, as a matter of common knowledge, well known to be very dangerous when allowed to come in contact with fire, and a recovery was denied for the reason that plaintiff was injured by an explosion while attempting to kindle a fire by the use of what she supposed to be standard kerosene, she having knowledge that there were live coals of fire in the stove; the court saying: "It seems to me that I must hold as a matter of law that it is hazardous negligence to attempt to light a fire in a stove where there are either live coals or a blaze by the use of kerosene oil even of the standard required by the statute."

We have considered respondent's contention that the doctrine of contributory negligence has no proper application to the facts of this case. He contends that the defendant was guilty of a willful wrong which resulted in plaintiff's injuries. It is true that he knowingly sold this mixture, and thereby willfully violated the law of this state which, in effect, provides that kerosene oil shall not be sold until it has been tested and shown that it will not flash below 120 degrees Fahrenheit. But the complaint as amended is not framed upon the theory of a recovery for a willful injury, but the plaintiff seeks to recover on account of the defendant's negligent act in selling the oil, knowing that it contained gasoline. It is nowhere claimed that the defendant did this with the willful intent of injuring the plaintiff. Therefore the general rule that contributory negligence has no application in cases where the injury is inflicted by the willful act or omission of the defendant does not apply. As stated in 7 Am. & Eng. Enc. Law, 443: "Willfulness and negligence are the opposites of each other; the one signifying the presence of intention or purpose, the other its absence. This distinction has not always been observed. Consequently there are cases that use the terms 'gross' or 'willful' negligence to designate willful injuries. Late cases have made the distinction clear. And the principle of the responsibility of the willful wrongdoer for all the consequences of his misconduct is really an old one." We think no authorities can be found holding that contributory negligence is not a defense under the facts in this case.

For the foregoing reasons, the judgment of the district court is reversed, and that court directed to enter judgment in appellant's favor, dismissing the action. All concur.

(113 N. W. 1025.)

MAX FRANKEL, EUGENE REGENTHAL AND FRED W. DAMLER, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF FRANKEL, REGENTHAL AND DAMLER, v. GEORGE M. HILLIER AND AUGUST TOETTCHER, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF GEORGE M. HILLIER.

Opinion filed Nov. 15, 1907.

Intoxicating Liquors — Action for Price — Shipment from Out the State — Defenses.

1. In an action by wholesale liquor dealers located in Minnesota to recover the purchase price of intoxicating liquors sold to persons residing in this state, the answer, in addition to a general denial, alleged that such sales were made in North Dakota, and therefore void under the provisions of section 7621, Rev. Codes 1899. *Held*, that such sales took place in Minnesota, the liquors having been delivered f. o. b. cars at St. Paul, pursuant to orders sent to plaintiffs at that place.

Same — Illegality of Contract Must be Pleaded.

2. Respondent sought to prove that such sales were made by plaintiffs with intent to enable defendants to violate the prohibitory law of this state. *Held*, that he could not avail himself of such defense under the pleadings; that, in order to urge the illegality of a contract when such illegality does not appear either upon its face or in the plaintiff's evidence necessary to prove the same, the defendant must specifically allege such illegality. Neither the contract upon its face nor the plaintiff's evidence disclosed that such contract was illegal; hence it was error to direct a verdict on such ground.

Same — Vendor's Knowledge of Intended Violation of Law.

3. Under the provisions of section 9390, Rev. Codes 1905, mere knowledge by the vendor of intoxicating liquors lawfully sold in one state that the vendee intends to resell them in violation of the law of another state, is not sufficient to defeat an action brought in the latter state by the vendor against the vendee to recover the purchase price thereof. In order to defeat such action for the purchase price, it must appear that the vendor intended by such sale, in some manner, no matter how slight, to aid the vendee in his unlawful design to violate the laws of this state.

Same.

4. The fact that the contract of partnership between the defendants, if any existed, was for an illegal purpose, to-wit, the unlawful traffic in intoxicating liquors, is not sufficient to defeat a recovery by plaintiffs, in the absence of proof that they were connected in some way with such illegal contract.

Proof of Partnership — Question for Jury.

5. The question as to whether the defendants were co-partners as alleged in the complaint is a mixed question of law and fact, and under the evidence the court could not determine such question as a matter of law. The respondent furnished the building and lot upon which such illegal business was conducted under an agreement with his co-defendant that he should receive one-half of the net profits of the business. *Held*, under the evidence, that it was for the jury to say what the intention of the parties was; such intention, when ascertained, being largely controlling.

Same — Evidence to Establish.

6. Less proof is requisite to establish a partnership in actions against alleged partners than is necessary in actions between the parties themselves.

Appeal from District Court, Richland county; *Allen, J.*

Action by Max Frankel and others against George M. Hillier and others. Judgment for defendants, and plaintiffs appeal.

Reversed.

McCumber, Forbes & Jones, for appellants.

Illegality of contract must be alleged and proven. 1 Enc. Pl. & Pr. 844; 7 Waits Actions and Defenses, 70; *Finley v. Quirk*, 9 Minn. 194 (Gil. 179); *Buchtel v. Evans*, 2 Pac. 67; *Jameson v. Coldwell*, 31 Pac. 279; *Lyts v. Keevey*, 32 Pac. 534; *Heffron v. Pollard*, 15 Am. St. Rep. 771; 1 Chitty's Pleadings (16th Am. Ed.) 506; *Bliss on Code Pleadings*, 330; *Miller v. Donovan*, 83 Pac. 608; *P. J. Bowlin L. Co. v. Brandenburg*, 106 N. W. 497; *Furst & B. Mfg. Co. v. Black*, 12 N. E. 504.

Existence of partnership is a question for the jury. 22 Am. & Eng. Enc. 51; 15 Enc. Pl. & Pr. 948; *Swofford B. D. G. Co. v. Cowgill*, 96 N. W. 215; *Sparling v. Smelter*, 95 N. W. 571; *Johnson v. Carter*, 94 N. W. 850.

Illegality of partnership cannot be asserted as a defense by its members. Rev. Codes, section 5079; 17 Am. & Eng. Enc. Law (1st Ed.) 892; 22 Am. & Eng. Enc. Law, 75; Mellison v. Allen, 2 Pac. 97.

Right of recovery is not affected by the fact that buyer intended to sell them illegally. 17 Am. & Eng. Enc. Law, 310 and 312.

Where orders are taken in one state, sent to another for approval, and shipped in the latter f. o. b., the sale is in the state where so shipped. 11 Am. & Eng. Enc. Law (1st Ed.) 472, 17 Am. & Eng. Enc. Law, 300; Kling v. Fries, 33 Mich. 274; Boothke v. Philip Best Co., 33 Mich. 340; Webber v. Donnelly, 33 Mich. 468; 1 Benjamin on Sales, sections 327 and 329; Engs v. Priest, 21 N. W. 580; Wind v. Iler, 61 N. W. 1001; Bollinger v. Wilson, 79 N. W. 109; American Express Co. v. State of Iowa, 136 U. S. 131, 49 L. Ed. 417; Black on Intoxicating Liquors, sections 267, 268; P. J. Bowlin Liquor Co. v. Brandenburg, *supra*.

Presumption of legality is stronger than that of the identity of laws. 1 Jones on Evidence, section 84; 1 Elliott on Evidence, section 120; Ounes v. Dauchy, 82 N. Y. 443.

Illegality of contract not presumed. 7 Waits Actions and Defenses, 65; Bowlin L. Co. v. Brandenburg, *supra*; 13 Am. & Eng. Enc. Law, 1061; Mohr v. Miesen, 49 N. W. 862; Gross v. Scarr, 33 N. W. 223; Cavender v. Guild, 4 Cal. 250; Black on Intoxicating Liquors, section 266; 3 Waits Actions and Defenses, 642; Abbott's Trial Brief (2d Ed.) 341.

To establish defense, defendant must show liquors were sold with intent to enable defendants to violate laws of North Dakota. 17 Am. & Eng. Enc. Law, 306; Black on Intoxicating Liquors, section 250; Abbott's Trial Brief (2d Ed.) 450; 1 Elliott on Evidence, section 96; 22 Am. & Eng. Enc. Law, 1234; 22 Am. & Eng. Enc. Law, 1341; Bollinger v. Wilson, 79 N. W. 101; M. Levy & Son v. Stegemann, 104 N. W. 372; Kling v. Fries, 33 Mich. 274; Wind v. Iler, *supra*.

Purcell & Divett, for respondents.

To hold one liable as partner it must appear that he has justified some one in acting upon his representations. Lindley on Partnership (2d Ed.) 42 and 43; 38 Am. Dig. Columns, 591, 592.

He must have done so prior to any one acting thereon. Lindley, Star Paging, 43; Palmer v. Pinkham, 37 Me. 252.

When a transaction in violation of public policy becomes known to the court it will of its own motion refuse relief. Abbott's Pleadings, volume 2, 1649; Critchfield v. Paving Co., 51 N. E. 552; Sheldon v. Pruessner, 35 Pac. 201; Handy v. St. Paul Globe Co., 42 N. W. 872; Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539.

FISK, J. Appellants, who are wholesale liquor dealers at St. Paul, Minn., brought this action against respondent and one Hillier to recover the purchase price of certain intoxicating liquors sold and delivered by them to the defendants. Defendants answered separately; the defendant Hillier expressly admitting liability, while defendant Toetcher denied any connection with the purchase of such liquors either as a partner with his codefendant, as alleged, or otherwise, and alleged upon information and belief that the sales of such liquors were made in this state in violation of law, and hence that no action is maintainable for the purchase price thereof. Upon the trial of the action in the district court, a verdict was directed in respondent's favor, and from a judgment entered pursuant thereto this appeal is prosecuted. A statement of the case was duly settled, embracing 23 specifications of error, 14 of which are assigned in appellant's brief. The first 10 assignments relate to rulings of the trial court upon the admission of certain evidence tending to show prior sales of intoxicating liquor by these plaintiffs to defendant; appellant's contention being that such evidence was inadmissible under the pleadings, the specific point being that there was no sufficient allegation in the answer that the sales were made with intent to enable the defendant to violate the laws of this state by making illegal sales of such liquors therein in contravention of the provisions of chapter 65, section 9353, of the Penal Code of 1905, relating to prohibition or the unlawful dealing in intoxicating liquors. The respondent's answer contains an allegation as follows: "Defendant further alleges upon information and belief that the goods, wares and merchandise for the purchase price of which this action is brought consisted of intoxicating liquors, the sale of which is prohibited in the state of North Dakota, and that the sales thereof, set forth in the complaint, were made in the state of North Dakota, and that such sales are void under the provisions of section 762 of the Revised Codes of 1905 of this state, and that no action is maintainable thereon."

The reference to section 762 was no doubt intended for section 7621 of the Revised Codes of 1899, and was manifestly a mere clerical error which would not render the pleading bad is otherwise sufficient. It is, however, unnecessary for us to consider the sufficiency of the defense thus attempted to be pleaded, or the assignments of error from 1 to 10, inclusive, as the undisputed evidence shows that the sales of these liquors took place in the state of Minnesota, the order for the same having been sent to appellants at St. Paul for approval, and the liquors having been delivered to the consignees f. o. b. cars at that place. As this fact is not seriously controverted by respondent's counsel, we merely cite the case of *P. J. Bowlin Liquor Co. v. Brandenburg*, 130 Iowa, 220, 106 N. W. 497, a case very similar to the case at bar, wherein it was held: "It is shown, however, without dispute, that the order given by defendant was made upon the plaintiff, a dealer in Minnesota, from which place the goods were to be shipped into this state. It is also shown without dispute that the authority of the traveling agent or salesman went no further than to take and transmit such orders subject to the approval of his employers, and that such was the order sent in on behalf of the defendant. This was not a violation of the laws of Iowa, and the indebtedness thus contracted by the defendant is enforceable in our courts because the contract of sale is held to have been made in Minnesota, where it first became effective by the plaintiff's approval of defendant's order"—citing prior decisions of that court. We will therefore assume for the purposes of this case that the defense attempted to be pleaded has not been established.

Respondent, however, seeks to invoke the aid of section 9390, Rev. Codes 1905, being section 7621, Rev. Codes 1899, without the necessity of pleading facts bringing the case within its provisions. Among other things, this section provides that "all sales, transfers, conveyances, mortgages, liens, attachments, pledges and securities of every kind, which, either in whole or in part, shall have been made for or on account of intoxicating liquors sold in violation of this chapter, shall be utterly null and void against all persons in all cases, and no rights of any kind shall be acquired thereby, and no action of any kind shall be maintained in any court of this state for intoxicating liquors, or the value thereof, sold in any other state or country contrary to the laws of said state or country or with intent to enable any person to violate any provision of

this chapter." Respondent's counsel urge that, even though they have not pleaded in the answer facts showing that plaintiffs sold said liquors with intent to enable the purchasers thereof to violate the provisions of the prohibitory law of this state, still they had the right to rely upon such defense as a bar to any recovery, and they cite in support thereof *Crichfield v. Paving Co.*, 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347; *Sheldon v. Pruessner*, 52 Kan. 579, 35 Pac. 201, 22 L. R. A. 709; *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695; *Oscanyen v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539. The first case cited was an action in assumpsit brought to recover compensation claimed to have been earned under an agreement which was attached to, the common counts in the declaration, and which upon its face disclosed its invalidity as being against public policy. The defendant pleaded the general issue. This contract was introduced in evidence at the trial, and in the Supreme Court it was urged that the question of the invalidity of the contract was not raised by the pleadings in the court below nor by objections to the introduction of evidence. In disposing of this contention the court very properly held as follows: "Where a contract is in terms contra bonos mores, it is not necessary for the defendant to plead the objections. A court will not proceed to judgment upon it even where both parties assent thereto. In such cases there can be no waiver. The defense is allowed, not for the sake of the parties, but for the sake of the law itself. 'The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. * * * Whenever the illegality appears, whether the evidence comes from one side or the other, its disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted by the vice of the original contract and void for the same reason. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its violation.'" In *Sheldon v. Pruessner*, *supra*, the illegality of the contract appeared in the plaintiff's evidence. In *Handy v. St. Paul Globe Pub. Co.*, the illegal contract was pleaded in the complaint and offered in evidence by the plaintiff at the trial. The illegality appeared on its face, and Gilfillan, C. J., in speaking for the court, and in answering plaintiff's contention that, not having

pleaded the illegality of the contract, the defendant could not assert it upon the trial, said: "It is sometimes necessary to plead the facts upon which the illegality of a contract or transaction depends, but it is never necessary to plead the law. When the facts appear either upon the pleadings or proofs, either party may insist upon the law applicable to such facts. In this case the plaintiff had under the pleadings to prove the contract under which he sued. If it be void on its face, he, not the defendant, showed its illegality." In *Oscanyen v. Arms Co.*, the Supreme Court of the United States recognized the old rule, which is still in force in a few jurisdictions, to the effect that pleading the general issue or a general denial puts in issue the legality of the contract sued upon. This rule, however, as we will hereafter see, is contrary to the great weight of authority in this country at the present time.

Appellants' counsel in their brief call attention to numerous authorities which they claim hold that a defendant, in order to avail himself of facts not apparent on the face of the contract to establish its invalidity, must specially plead such facts. No doubt these authorities contain a sound statement of the general rule; but we think the rule has certain well-recognized exceptions. If the illegality appears from the contract itself or from the evidence necessary to prove it, the same may be taken advantage of without specially pleading such fact. We think the correct rule is announced in 9 Cyc. pp. 741, 742, as follows: "In many cases decided under American statutes requiring the fact constituting the cause of action or defense to be pleaded, it has been decided that evidence going to show the illegality of the contract in suit cannot be given under a general denial, or the general issue, if the contract is valid on its face, and the illegality does not appear from plaintiff's proof; but the defense must be specially pleaded and the facts going to show in what the illegality consists must be stated"—citing many authorities. We will refer to a few of such authorities. *Mo.*, etc., *Ry. Co. v. Bagley*, 60 Kan. 424, 56 Pac. 759; *Suit v. Woodhall*, 116 Mass. 547; *Finley v. Quirk*, 9 Minn. 194 (Gil. 179), 86 Am. Dec. 93; *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695; *McDermott v. Sedgwick*, 140 Mo. 172, 39 S. W. 776; *Fitzgerald v. Fitzgerald*, 44 Neb. 463, 62 N. W. 899; *Milbank v. Jones*, 127 N. Y. 370, 28 N. E. 31, 24 Am. St. Rep. 454. See, also, *Miller v. Donovan*, 11 Idaho, 545, 83 Pac. 608; *Jefferson v. Burnhans*, 85 Fed. 949, 29 C. C. A. 481,

decided by the Circuit Court of Appeals of the Eighth Circuit; *Smith et al. v. Leddy et al.*, 50 Iowa, 112. See, also, 1 Enc. Pl. & Pr. 844, and cases cited. In *Suit v. Woodhall*, Gray, C. J., said: "The present action is upon an account annexed for goods sold and delivered. The defendant was not entitled to avail himself of the defense that the contract of sale was illegal without clearly and precisely setting it up in his answer." In *McDermott v. Sedgwick* the Supreme Court of Missouri said: "The question, then, is whether this defense is available under a general denial. It is held in *Sprague v. Rooney*, 104 Mo. 360, 16 S. W. 505, that the effect of a general denial is to deny the legality of the contract sought to be enforced, and under it evidence is admissible to prove that the real contract, which on its face is valid, is, in fact, intended to accomplish an immoral and illegal object. The rule declared in the *Sprague Case*, *supra*, seems to be in conflict with the weight of authority in this state, and the contrary doctrine was declared by the same judge in the subsequent case of *St. L. A. & M. Ass'n v. Delano*, 108 Mo. 220, 18 S. W. 1101. The learned judge there says: "There is nothing on the face of the petition herein which indicates any other than a valid contract between the plaintiff and defendants; and, when this is the case, the rule is that, if the contract is to be invalidated by reason of some extrinsic matter, such matter must be pleaded in order that it may be made issuable at the trial so that it may be considered on appeal."

* * * But, when the illegality does not appear from the contract itself or from the evidence necessary to prove it, but depends upon extraneous facts, the defense is new matter and must be pleaded in order to be available." In *Jefferson v. Burnhans*, *supra*, Judge Thayer, speaking for the Circuit Court of Appeals of this circuit, said: "Expressing the same idea in different form, it may be said that a defendant cannot take advantage of the fact that a contract which he has entered into is illegal without pleading such defense, except in those cases where the contract itself or the testimony offered to establish its existence or to support some other issue shows that it is illegal"—citing numerous cases. We are convinced that the rule as supported by the foregoing authorities is correct on principle. For a statement of the old rule that under the general issue or a general denial such defense may be shown, see 9 Cyc. p. 740, and cases cited.

Section 9390, Rev. Codes 1905, *supra*, was not enacted in the interest of vendees of intoxicating liquors who engage in the unlawful traffic sought to be prohibited, but was enacted in the interest of a sound public policy, for the purpose of more effectually insuring the strict enforcement of the law against the unlawful traffic aforesaid, and to this end the court, regardless of defendant's answer, will, whenever the facts as shown by the evidence warrant it, give effect to such statute by refusing to permit such actions to be maintained; but the defendant, in order to invoke the statute, must affirmatively plead such defense, except as above stated, where such facts are disclosed either upon the face of the contract itself or in the plaintiff's proof. Applying the foregoing rule to the facts herein, we are compelled to hold that the trial court erred in directing a verdict in defendant's favor. There was nothing showing the illegality of the contract upon its face, and there was no evidence introduced which would warrant the court as a matter of law in holding such contract illegal or in invoking the provisions of section 9390, aforesaid. The most that can be claimed for it is that plaintiffs, through their agent, Fowler, had knowledge that the defendants were engaged in the unlawful business of selling intoxicating liquors in this state. By the great weight of authority, this is not sufficient to bring the case within the terms of the statute above referred to. See 9 Cyc. pp. 571, 572, and cases cited, where the rule is stated thus: "In the United States, while some courts have followed the English rule, most of the courts have taken a different view, and have held that the mere knowledge of the seller of goods or services, or of the vendor or lessor of property, that the buyer intends an illegal use of them, is no defense to an action for the price or for rent." The authorities cited are too numerous to refer to in this opinion, but see *Bowman Distilling Co. v. Nutt*, 34 Kan. 729, 10 Pac. 163; *Bancher v. Monsel*, 47 Me. 58; *Webber v. Donnelly*, 33 Mich. 469; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Tuttle v. Holland*, 43 Vt. 542; *Anheuser-Busch B. Ass'n v. Mason*, 44 Minn. 318, 46 N. W. 558, 9 L. R. A. 506, 20 Am. St. Rep. 580. 17 Am. & Eng. Enc. Law (2d Ed.) p. 312, states the rule thus: "Although there are a few decisions which maintain a contrary doctrine, the decided weight of authority is to the effect that mere knowledge by the vendor of intoxicating liquors lawfully sold in one state that the vendee intends to use them in violation of the laws of another state

will not defeat an action brought in such other state by the vendor against the vendee for the purchase price. If, however, the vendor in any way, no matter how slight, aids the vendee in his unlawful design to violate the laws of the other state, such participation will prevent the vendor from maintaining an action to recover the purchase price. The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of the other state, and requires an act on the part of the seller in furtherance of the scheme. According to the weight of authority, however, to render the sale void and defeat a recovery for the price, it is necessary that there be some participation or interest of the seller in the act itself." See, also, note to the case of *Graves v. Johnson*, 15 L. R. A. (Mass.) 834; s. c., 32 Am. St. Rep. 446; also, *Kohn et al. v. Melcher* (C. C.) 10 L. R. A. 439, 43 Fed. 641; *M. Levy & Son v. Stegemann*, 104 N. W. (Iowa) 372; *Whitlock v. Workman & Co.*, 15 Iowa, 351; *Second Nat. Bank v. Curren*, 36 Iowa, 555; *Tegler & Co. v. Shipman*, 33 Iowa, 194, 11 Am. Rep. 118.

One other point remains to be considered. It is respondent's contention that there was no proof showing that he was a partner with his codefendant in the unlawful business. This contention is based upon two theories: First, that the arrangement between these parties to the effect that respondent was to furnish the building and premises where the business was conducted, under an agreement that Hillier, his codefendant, should conduct the business and divide the profits, did not constitute a partnership; and second, that an agreement of partnership to engage in an unlawful business is void, and hence no partnership could, in fact, exist. We do not think there is any merit in the last contention. Plaintiff's rights are not affected by the illegality of the partnership agreement; they not being parties to the illegality. 17 Am. & Eng. Enc. Law (1st Ed.) pp. 92, 93 and cases cited; 22 Am. & Eng. Enc. Law (2d. Ed.) p. 75, and cases cited. The first proposition—that an arrangement by which one person furnishes property for the use of another under an agreement that such other person may use it, and the profits of its use to be divided, does not constitute a partnership—involves a more serious question. Section 5818, Rev. Codes 1905, defines a partnership to be the association of two or more persons for the purpose of carrying on business together and dividing its profits between them. Authorities may be found holding,

under a statute similar to the above, that one who receives a share of profits in lieu of rent for the use of property, real or personal, is not a partner with the person using such property. 22 Am. & Eng. Enc. Law, p. 36, and cases cited. It is said, however, that such persons will be deemed to be partners where such is their clear intent, as the use of the property as well as the property itself may be contributed as capital by a partner. *Id.*, pp. 36, 37, and cases cited. "Since partnership depends upon the existence of an intention to be common owners of the profits of a business, it is obvious that it cannot be determined by the application of any arbitrary test. It is a mixed question of law and fact, and must be determined from a construction of the entire contract in the light of all the evidence." 22 Am. & Eng. Enc. Law, p. 30, and cases cited. The rule seems to be well settled that in actions against alleged partners less proof is requisite to establish the partnership than is necessary in actions between the parties themselves. 9 Enc. of Ev. 553, and numerous cases cited; 22 Am. & Eng. Enc. Law, p. 38. In *McDonald v. Battle House Co.*, 67 Ala. 90, 42 Am. Rep. 99, it was held that although one may not have an interest in the capital or property employed in a particular business, yet, if he has an interest in the profits of such business as profits, this will constitute him a partner as to third persons. We quote from the opinion as follows "It is sometimes true that, contrary to their intention, persons may become partners as to third persons dealing with them, when they do not intend to form that relation. This occurs in that large class of cases when there may not be a community of interest in the property or capital employed in a particular business, yet one of those engaged in it has a special interest in the profits of the business as profits—a clear right of participation in the net profits. This by construction of law creates a partnership, for the reason, as said by De Grey, C. J., that 'every man who has a share of the profits of a trade ought also to bear his share in the loss; and, if any one takes part of the profits, he takes part of that fund on which the creditor of the trader relies for payment.' But a community of interest in the profits, the net profits, as such, is essential to a partnership. Community of interest is the basis of the relation." See generally upon this question the very able article on the subject of partnership in 22 Am. & Eng. Enc. Law; also, the elaborate note contained in 115 Am. St. Rep., commencing at page 400.

In the light of the foregoing rules and after a careful consideration of the evidence in this case, we are convinced that the question as to whether defendants were partners was properly a question for the jury to determine under instruction by the court as to the law, and that it was an error therefore to direct a verdict.

The judgment is accordingly reversed and a new trial ordered. All concur.

(113 N. W. 1067.)

REEVES & COMPANY V. JOHN BRUENING.

Opinion filed Dec. 10, 1907.

Sale — Enforcement of Vendor's Lien — Purchase by Seller.

1. Plaintiff agreed to sell to defendant, and defendant agreed to purchase from plaintiff, a certain threshing rig, and, upon defendant's refusal to accept and settle for such property, plaintiff proceeded to enforce a vendor's lien for the purchase price pursuant to section 6284, Rev. Codes 1905. Plaintiff, without defendant's consent, bid such property in at the foreclosure sale. *Held* that, the statutory manner of foreclosing such liens being the same as that prescribed for the foreclosure of liens on pledged property, plaintiff had no right, in the absence of defendant's consent, to purchase the property at the sale, and such sale was therefore voidable at defendant's election.

Pledges — Foreclosure — Statutes.

2. The enactment of section 6296, Rev. Codes 1905, which provides generally that liens upon personal property may be foreclosed upon the notice and in the manner provided for the foreclosure of mortgages upon personal property, did not operate to repeal the special provision relating to the foreclosure of pledged property as contained in chapter 76 of the Civil Code (Rev. Codes 1905, sections 6193-6218).

Statutes — Repeal by Implication.

3. The rule of statutory construction that repeals by implication are not favored, and that special provisions of a statute are not repealed by general provisions relating to the same subject matter unless the legislative intent to that effect is manifest, is stated and applied in the opinion.

Foreclosure of Lien — Purchase by Seller — Ratification.

4. Defendant not having consented to, nor ratified, such purchase by plaintiff, the sale was ineffectual to transfer the title of the property to plaintiff. Hence no recovery can be had in this action under the rule of damages prescribed in subdivision 1, section 6573, Rev. Codes

1905, and the district court therefore erred in rendering judgment for plaintiff.

Appeal from District Court, Foster county; *Burke, J.*

Action by Reeves & Co. against John Bruening. Judgment for plaintiff. Defendant appeals.

Reversed, and action dismissed.

F. Baldwin and *C. B. Craen*, for appellant.

Where two clauses of a statute are irreconcilable, that which is directed specially to the matter, will control, rather than that which is merely incidental. 26 Am. & Eng. Enc. Law, 619; *Long v. Culp*, 14 Kan. 412; *Griffith v. Carter*, 8 Kan. 565.

Pledgee cannot buy at his own sale. 22 Am. & Eng. Enc. Law. 891; *Wright v. Ross*, 36 Cal. 414; *Bryan v. Baldwin*, 52 N. Y. 232.

To justify such purchase he must show an agreement with pledgor or a stipulation. 16 Cyc. 928, 931.

The sale was not according to law. *Stanford v. McGill*, 6 N. D. 536, 72 N. W. 938.

The measure of damages is the difference between price agreed on and market value. *Minneapolis Threshing Machine Co. v. McDonald*, 10 N. D. 408, 87 N. W. 993.

Turner & Wright, for respondent.

Subsequent legislation repeals previous inconsistent laws. 1 Lewis Suth. St. Const. (2d Ed.) section 247; *Campbell v. Case*, 1 Dak. 17, 46 N. W. 504; *State v. Welbes*, 75 N. W. 820; *Van Den Bos v. Douglas Co.*, 76 N. W. 935.

FISK, J. Plaintiff recovered judgment in the district court of Foster county, and defendant has brought the case here for trial de novo of the entire case.

Plaintiff's cause of action arises out of a contract entered into between the parties on August 17, 1903, by the terms of which the plaintiff agreed to sell to the defendant, and the latter agreed to purchase from plaintiff, a threshing rig consisting of an engine separator, self-feeder and other attachments, at the agreed price of \$3,100, and freight charges on the same from Columbus, Ind., to Carrington, in this state. Plaintiff contends that defendant refused to receive and settle for said rig pursuant to the contract,

and that thereafter, and on August 6, 1904, it foreclosed its vendor's lien thereon by a sale of said property, first having given public notice of such sale as required by law, and having personally served upon defendant a notice of such sale. Plaintiff bid the property in at the foreclosure sale for the sum of \$1,500, and the object of this action is to recover the difference between what defendant agreed to pay for said property under the aforesaid sale contract, with interest, less the said sum of \$1,500. Plaintiff claims the right to recover said sum as damages under the provisions of subdivision 1, section 6573, Rev. Codes 1905, which reads as follows: "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him is deemed to be: (1) If the property has been resold pursuant to section 6284, the excess, if any, of the amount due from the buyer under the contract over the net proceeds of the resale. * * *" Section 6284 is as follows: "One who sells personal property has a special lien thereon, dependent on possession for its price if it is in his possession when the price becomes payable; and may enforce his lien in like manner as if the property was pledged to him for the price." Several questions are presented by counsel, but the view we take regarding the alleged foreclosure sale renders it unnecessary for us to consider any other question. We are convinced, for the reasons hereinafter given, that such attempted sale was voidable as to the defendant; and hence that plaintiff cannot recover in this action, and, as a necessary consequence, that the trial court erred in rendering judgment in plaintiff's favor. Plaintiff had a special lien upon the property, dependent upon possession, and could enforce such lien only in the manner in which a lien by pledge could have been enforced. Section 6284, Rev. Codes 1905. Turning to chapter 76 of our Civil Code (Rev. Codes 1905, sections 6193-6218), relating to pledges, we find two methods of foreclosure prescribed—one by public auction in the manner and upon the notice usual at the place of sale relating to auction sales of similar property (section 6212, Rev. Codes 1905), and the other by a judicial sale under the direction of a competent court, at which latter sale the pledgee may be authorized by the court to purchase at the sale. Section 6218, Rev. Codes 1905. At a foreclosure sale conducted in the manner first mentioned it is clear that in the absence of consent thereto by the pledgor, and none was shown in this case, the pledgee could not become the purchaser of the prop-

erty sold. Section 6217, Rev. Codes 1905. The chapter on pledge as contained in our Civil Code was evidently borrowed from California; and prior to 1895 the two statutes were identically the same. In 1895 the section of the California Code corresponding with section 6217 of our Code was amended so as to permit the pledgee to purchase at the foreclosure sale without the pledgor's consent. Prior to such amendment, the rule was firmly settled by the Supreme Court of that state in accordance with the construction here adopted by this court. *Wright v. Ross*, 36 Cal. 414; *Hill v. Finnigan*, 62 Cal. 426. In the latter case it was said: "The section was undoubtedly enacted for the protection of the pledgor, to the end that no unfair advantage be taken of him. It prohibits a pledgee or pledge holder from purchasing any property pledged except by direct dealing with the pledgor." By such dealing with the pledgor the pledgee may purchase it. Why should it be held that by this is meant that the pledgee or pledge holder can only purchase by taking a direct transfer from the pledgor? The statute does not say so, and the reason of the prohibition suggests the contrary. If the pledgor chooses to do so, we see no reason why he may not consent that the pledgee may buy at the public sale. In some cases it may be to his interest that this be done. Such consent may be given either at the time of making the pledge or at any subsequent time, without changing the form of the original contract and without consideration." Such we also understand to have been the general rule relating to foreclosure sales of pledged property, in the absence of a statute to the contrary. The rule is stated thus: "The law does not permit the pledgee to become a purchaser of the property pledged at his own sale. Such a purchase is contrary to the principle that forbids a party to purchase property when he has a duty to perform with reference to such property, which is inconsistent with the character of the purchaser." 22 Am. & Eng. Enc. Law, 891, and cases cited, especially *Bryan v. Baldwin*. 52 N. Y. 232.

The object of such rule is apparent. It was to prevent the pledgee from obtaining an unconscionable advantage over the pledgor. A purchase by the pledgee is not void, but merely voidable at the election of the pledgor. It has accordingly been held that the latter may ratify such sale either expressly or impliedly by long acquiescence. 22 Am. & Eng. Enc. Law, 892, and cases cited; *Winchester v. Joselyn*, 31 Colo. 220, 72 Pac. 1079, 102 Am.

St. Rep. 30. But under the facts in the case at bar, there is no evidence of any express ratification, and we are satisfied that defendant cannot be held to have impliedly ratified the same. Furthermore, we do not understand that counsel for respondent makes any such contention. On the other hand, they concede that there might be much merit to appellant's contention upon this point, were it not for the provisions of section 6296 of the Revised Codes of 1905. This section provides: "Upon default being made in the payment of a debt secured by a lien upon personal property, such lien may be foreclosed upon the notice and in the manner provided for the foreclosure of mortgages upon personal property," etc. It is respondent's contention that the enactment of this section in 1905 worked an implied repeal of the sections heretofore mentioned, relating to the foreclosure of pledged property. This contention is based upon the assumption that these sections, in so far as they relate to the method of foreclosure, are inconsistent with and necessarily repugnant to the provisions of section 6296 aforesaid. In this we are unable to give our assent. The former sections deal specially with foreclosures of pledges, while the latter section deals generally with foreclosures of liens upon personal property. This being true, the enactment of the latter section does not effect a repeal of the former. The correct rule of construction in such cases is as follows: "It is an old and familiar rule that where there is in the same statute a particular enactment and also a general one, which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative and the general enactment must be taken to affect only such cases within its general language as are not within the vision of the particular enactment. But this rule is subordinate to the principle, just stated, that statutes are to be so construed that, if possible, full effect shall be given to all parts thereof. This rule must be applied to ascertain wherein language which is specific necessarily comes in conflict with language which is general; and it is only when on such construction the repugnancy of specific provisions to the general language is plainly manifested that the intent of the legislature as declared in the general enacting part of the statute is superseded." 26 Am. & Eng. Enc. Law, 618, 619, and cases cited. "Repeals by implication are not favored, and will not be indulged unless it is manifest that the legislature so intended." 26 Am. & Eng. Enc. Law, 721, and cases cited. See,

also, 2 Current Law, 1734-1736, and recent authorities cited. A consideration of no little weight in favor of the construction of these statutory provisions as above stated is the fact that the Code commissioners who prepared and reported to the legislative assembly the Revised Codes of 1905, and which commission inserted section 6296, did not consider that said section repealed the other sections referred to, nor did the legislative assembly in enacting said codes so construe the same, for the section claimed to have been thus repealed were retained intact as they formerly existed.

It is therefore our duty, if possible, to harmonize said sections, to the end that the intent so apparent may be given effect. We accordingly hold that the sections of the Code heretofore referred to, and which relate to the foreclosure of a pledge, are and were on August 6, 1904, in full force and effect, and that such sale was therefore invalid as to the defendant, he not having ratified the same. Respondent's counsel do not contend that they have any right to recover in this action, except upon the theory that such foreclosure was valid.

It follows, therefore, from what we have above said that the judgment appealed from must be reversed, and the action dismissed, and it is so ordered. All concur.

(114 N. W. 313.)

JACOB HAESSLY v. HERMAN THATE.

Opinion filed Dec. 12, 1907.

Justice of the Peace — Appeal — Transmission of Transcript — Dismissal.

1. An appeal to the district court from a judgment of a justice of the peace having been duly taken and perfected by the service of a notice of appeal and undertaking, pursuant to Rev. Codes 1905, sections 8500, 8507, it was error to dismiss the same upon the ground that the justice had failed to transmit to the clerk his transcript as required by the latter section.

Same — Order for Transmission — Transcript.

2. Under the facts stated in the opinion, it was an abuse of discretion to deny appellant's motion for an order requiring the justice to transmit to the clerk a certified transcript as required by law.

Appeal from District Court, Cass county; *Pollock, J.*

Action by Jacob Haessly against Herman Thate. From a judgment of the district court dismissing an appeal from a judgment of a justice, defendant appeals.

Reversed, and appeal reinstated.

Barnett & Richardson, for appellant.

The district court's jurisdiction attaches upon filing bond on appeal from justice court with the clerk. *Eldridge v. Knight*, 11 N. D. 552, 93 N. W. 860; *Petty v. Miller*, 24 S. W. 330; *Edminster v. Rathbun*, 52 N. W. 263; *McLaughlin v. Mitchell*, 84 N. W. 777.

It is mandatory upon district court to order transmission of proper record. *Burgess v. Court*, 13 Pac. 166; *Wilson v. Paxton*, 52 Pac. 911; *Stuber v. Rohlf*s, 12 Pac. 830; 12 Enc. Pl. & Pr. 787-788; *Allard v. Smith*, 97 N. W. 510; *State v. Superior Court*, 37 Pac. 448; *Jacobs v. Oren*, 48 Pac. 431; *Bruins v. Downey*, 45 Wis. 496; *Cour v. Cowdry*, 54 N. W. 935; *Demming v. Weston*, 15 Wis. 236; *Woods v. Oregon Short Line Ry.*, 81 Pac. 235.

W. J. Courtney, for respondent.

Where appellant fails to have transcript sent up, and no diligence is shown, court must dismiss. *McLaughlin v. Michel*, 84 N. W. 777; *DeFoe v. Zenith Coal Co.*, 13 N. D. 236, 103 N. W. 747.

FISK, J. This is an appeal from a judgment of the district court dismissing an appeal to that court from a judgment of a justice of the peace. The record discloses that the action was tried in the justice court of one H. Heffron, a justice of the peace, and judgment rendered by such court on December 28, 1905, in plaintiff's favor. Within the time allowed by law an appeal was duly taken and perfected from such judgment to the district court by the service and filing of a notice of appeal and undertaking in all respects regular. Upon the service and filing of such notice of appeal and undertaking with the clerk he mailed to said justice a written notice as prescribed by law, requiring such justice to transmit the record in said case to such clerk. Thereafter, and on February 7, 1907, the justice transmitted to the clerk the summons, complaint, and other papers in said action, and the same were filed in the clerk's office, but the justice neglected to transmit with his return any certificate authenticating such papers or any certified

copy of his docket as required by section 8507, Rev. Codes 1905, although the clerk's records contain an entry reciting the fact that on February 7th he filed transcript from the justice. No term of the district court was held at which the action could be tried until the January, 1907, term, at which the appeal was dismissed. When the case was reached for trial in its regular order upon the trial calendar for said term, plaintiff moved for its dismissal. The principal ground of such motion, and the one upon which the trial court granted the same, was the failure of the justice to transmit a certified transcript of his docket as required by law. We need not consider the other grounds, as they are not argued in respondent's brief, and hence will be deemed abandoned.

Before plaintiff's motion was acted upon by the court, defendant's counsel made a counter motion to the effect that an order be made requiring the justice forthwith to file a transcript of his proceedings in said action with the clerk. The latter motion was denied and the plaintiff's motion granted, and the correctness of these rulings are the sole questions before us on this appeal. Respondent's contention, in brief, is that it was appellant's duty, under the statute, to see at his peril that the justice performed his statutory duty of transmitting to the clerk a proper transcript of the proceedings, and to this end he was obliged, without unreasonable delay, to apply to the district court for an order compelling such justice to transmit the transcript aforesaid, and his failure in this respect entitled plaintiff to a dismissal of the appeal; or, in other words, his contention is that under the facts the trial court acted with a sound judicial discretion in granting plaintiff's motion. It is not claimed that appellant had any knowledge of the fact that said justice had neglected to transmit his official transcript to the clerk at any time prior to the date such motions were made, nor is it contended that the failure to have said transcript filed in any manner prejudiced plaintiff's rights prior to such time. We are unable to reach the conclusion arrived at by the learned trial court, for reasons which we will briefly state. We are of the opinion that, when appellant served and filed notice and undertaking on appeal, he did all that was incumbent upon him by statute to do in order to transfer the cause to the district court, and he had a right to assume that the justice would discharge his statutory duty. We are not called upon to say in this case what appellant's

duties might be if the facts disclosed that he was cognizant of the negligent discharge by the justice of his statutory duties; for so far as this record is concerned, the first intimation received by appellant of such neglect of duty by the justice was when respondent made his motion to dismiss the appeal, and appellant acted promptly thereafter by making his motion aforesaid. We are of the opinion that under the facts in this case the trial court should have granted appellant's motion, and that it was a clear abuse of discretion not to have done so. This being true, it was, of course, prejudicial error to dismiss the appeal.

Certain decisions from South Dakota are cited by respondent's counsel in support of the rulings of the trial court. We do not question the soundness of these decisions, but they were based upon a statute embraced in the compiled laws of the territory of Dakota, expressly providing for the dismissal of appeals under the facts disclosed here; hence are not in point, as will hereafter be noticed, as our statute was materially changed in the Revised Codes of 1895. Our attention is also called to the case of *De Foe v. Zenith Coal Co.*, 14 N. D. 236, 103 N. W. 747, as supporting the ruling of the trial court. That case is clearly not in point, as we will readily see. It was there merely held that section 6771a, Rev. Codes 1899, being section 8501, Rev. Codes 1905, governing appeals on questions of law alone, "does not make it the mandatory duty of the district court to dismiss an appeal for delay in the transmission of the transcript;" the court holding that whether the delay of appellant in applying for an order requiring the justice to certify and transmit the proceedings was a sufficient ground for a dismissal of the appeal was a matter within the exercise of a sound discretion by the district court. Under the facts in that case it was held an abuse of discretion to dismiss the appeal. It will be noticed that a marked distinction exists between section 8501, relating to appeals on questions of law, and section 8507, relating to appeals generally. The latter section is a portion of article 1 of chapter 6 of the Justice's Code, relating to appeals in civil cases, which was reported by the code commission and enacted in 1895, the enactment of which wrought a radical change in the law previously in force on that subject. No doubt one of the changes intended to be made by this new law was to do away with the former practice of dismissing appeals for failure of the justice to transmit his record. Such we understand to be the statute

law of this state at present, except as to appeals upon questions of law alone. In 1897 the legislative assembly enacted what is now section 8501, Rev. Codes 1905, which, as before stated, merely relates to appeals upon questions of law alone, and, in so far as such appeals are concerned, the former practice was partially reinstated permitting a dismissal of the appeal where the record of the justice has not been transmitted, and no application is made by appellant for an order requiring the justice to certify and transmit the same. Why this legislative distinction in the practice upon this subject between appeals generally and appeals on law questions merely is of no concern to us. The law being plain, it is our duty to recognize and enforce such distinction.

It will be observed that there is a marked difference between the provisions of section 8507 of our present Code and the statute as it formerly existed in this state and as it now exists in South Dakota. Under section 8507 it is made the duty of the justice within ten days after notice to transmit the record, but there is no duty cast upon the appellant to see that such record is transmitted, and it nowhere provides that a failure to have the record transmitted shall be a ground for dismissal of the appeal; while the former statute expressly provided "that, if the record was not filed within 15 days from the time the appeal was perfected, the appeal shall be dismissed upon notice." Under statutes similar to the provisions of section 8507, the authorities hold that a failure of the justice to transmit the record is not a ground for dismissal of the appeal. 2 Current Law, 664; 12 Enc. Pl. & Pr. 787, 788, and numerous cases cited. See, also, *Goodrich v. Peterson*, 12 Wyo. 214, 74 Pac. 498; *Struber v. Rohlf*s, 36 Kan. 202, 12 Pac. 830; *Coates v. Bryan* (Tex. Civ. App.) 40 S. W. 748; *Shepard v. Duke* (Tex. Civ. App.) 28 S. W. 567; *Woods v. Railroad*, 46 Or. 514, 81 Pac. 235. In *Goodrich v. Peterson*, supra, it was said: "Did the fact that the justice failed to perform the duty required of him by statute to transmit his transcript and the papers within five days authorize the district court to dismiss the appeal? In reason and by the great weight of authority, it did not. The transmittal is the duty of the officer, and not of the appellant. There is no reason why he should be held responsible for its performance, and the statute does not make him responsible. The statute does not undertake to punish the appellant for the failure of the officer to perform his duty, and there is no intimation in any of its provisions

that the penalty of such failure shall be a dismissal of the appeal."

The judgment appealed from is accordingly reversed and the district court is directed to reinstate said appeal. All concur.
(114 N. W. 311.)

LIZZIE SMITH AND JAMES SMITH V. ANTON JENSEN AND STUTSMAN COUNTY BANK, PAUL KUNERT AND H. U. LAFRANTZ.

Opinion filed Dec. 13, 1907.

Absolute Deed a Mortgage — Evidence.

1. A deed, absolute in form, will be held to be a mortgage where the proof is clear, convincing, and satisfactory that such was the intention of the parties.

Same.

2. Where it is admitted that a deed absolute in form was not intended as an unconditional conveyance, but the controversy is as to whether the same was a mortgage or a conditional sale with the right to repurchase the property at or before a future date, the same will ordinarily be held to be a mere security transaction, and therefore a mortgage, where the true character of such transaction is left in doubt by the evidence.

Same — Bona Fide Purchaser.

3. Evidence in this case examined, and *held* to establish plaintiff's contention that the transaction was intended as a mortgage. Evidence also *held* to establish the fact that defendant bank took its deed from defendant Jensen with full knowledge of the rights of plaintiff Lizzie Smith to effect a redemption of said property.

Same — Accounting — Redemption — Tender.

4. In an action by a vendor to have a deed, absolute in form, adjudged a mortgage, and asking for an accounting and right to redeem, the amount of indebtedness and right to redeem being in dispute, it is unnecessary for plaintiff to allege or prove a tender to defendant of any sum prior to the commencement of the action; it being sufficient for plaintiff to allege and prove a willingness to redeem by paying such sum as may be adjudged to be due and owing by him to defendant.

Same.

5. The evidence as to the amount of the indebtedness existing after deducting the net amount of the rents and profits being vague and un-

certain, the district court is directed to take an account of these matters, and upon determining such sum to enter judgment in accordance with the opinion.

Appeal from district court, Stutsman county; BURKE, Judge.

Action by Lizzie Smith and James Smith against Anton Jensen and the Stutsman County Bank. Judgment for plaintiffs, and defendants appeal.

Modified.

J. A. Coffey, W. O. Lowden and S. E. Ellsworth, for appellants.

Proofs to determine a deed to be a mortgage must be clear, specific and satisfactory. *Jasper v. Hazen*, 4 N. D. 1, 58 N. W. 454; *Little v. Braun*, 11 N. D. 410, 92 N. W. 800; *Sargent v. Cooley*, 12 N. D. 1, 94 N. W. 576.

A sale, with a covenant to reconvey, may differ from a mortgage. *Henley v. Hotaling*, 41 Cal. 22; *Conway's Ex'rs v. Alexander*, 7 Cranch. 218; *McGuin v. Lee*, 10 N. D. 160, 86 N. W. 714; *Knight v. McCord*, 19 N. W. 310.

To obtain a reconveyance plaintiff must tender what he agreed to pay. *Merchants State Bank of Fargo v. Tufts*, 14 N. D. 238, 103 N. W. 760.

Parks & Olsberg, for respondents.

Circumstances of parties may be considered in determining the transaction. *Wells v. Geyer*, 12 N. D. 316, 96 N. W. 289; *O'Toole v. Omlie*, 8 N. D. 444, 79 N. W. 849; *Merchants State Bank of Fargo v. Tufts*, 14 N. D. 238, 103 N. W. 760; *State Bank of O'Neil v. Mathews*, 63 N. W. 930; *Fahay v. State Bank of O'Neil*, 95 N. W. 505; *Tower v. Fetz*, 42 N. W. 884; *Nelson v. Atkinson*, 56 N. W. 313; *Niggeler v. Maurin*, 24 N. W. 369; *Dembitz on Land Titles*, p. 726, article 96; *Beebe v. Wisconsin Mortgage Loan Co.*, 93 N. W. 1103.

FISK, J. This litigation arose in the district court of Stutsman county, and the case is here for trial de novo. The object of the suit is to have a certain deed, absolute in form, adjudged a mortgage, and for an accounting as to the amount due thereon after deducting the value of certain rents and profits of the premises, collected by the defendant. The issues were tried in the court

below in January, 1906, and in May following the trial court made findings of fact and conclusions of law in favor of the plaintiffs and thereafter judgment was rendered thereon, from which this appeal was taken.

Certain facts are not in dispute. It is conceded that the plaintiff Lizzie Smith was on the 24th day of February, 1904, the owner in fee of the premises in controversy, being lot 13, block 11, of Randall's addition to the village of Kensal, in Stutsman county, and that on said date the plaintiffs Lizzie Smith and her husband, James Smith, executed and delivered to the defendant Jensen a deed of conveyance to said premises, absolute in form, and contemporaneously therewith a contract was entered into between the parties, by the terms of which Jensen agreed to reconvey said premises to Lizzie Smith upon the payment on or before September 1st, thereafter of the sum of \$600. It is also undisputed that such payment was not made or tendered on or prior to said date, and that thereafter, and on October 22, 1904, Jensen, in consideration of the sum of \$710, executed and delivered to the defendant Stutsman County Bank an absolute deed of conveyance to said premises. Briefly stated, the contentions of the various parties were and are as follows: Plaintiffs assert that the deed from them to Jensen was executed and delivered merely for the purpose of securing an indebtedness due by them to Jensen, amounting to about \$540, and that the defendant bank took this deed from Jensen with full knowledge that the deed from plaintiffs to Jensen was a mere security transaction. Defendant Jensen asserts that the deed from plaintiffs to him was intended to be and was an absolute conveyance, and not a mortgage, and that the agreement entered into between them was an independent contract, whereby he agreed to sell to plaintiffs the premises for the consideration of \$600, provided plaintiffs made payment of such sum on or before September 1st. He also contends that the defendant bank purchased the premises from him without notice of plaintiff's rights. The defendant bank's contention is practically the same as that of Mr. Jensen. Defendant La Frantz did not appear in the action, and defendant Kunert disclaims any interest in the premises in controversy. Certain other facts are in dispute, relative to the value of the premises and the rents and profits thereof, which will be hereafter noticed. The findings and conclusions of the trial court are substantially in accord with the plaintiffs' contentions. Among other things, that

court found that the deed in question was merely intended as security for the payment of the sum of \$540, which sum had not been paid; that Jensen in the month of October, 1904, in consideration of \$710, executed and delivered to defendant bank a deed of conveyance to said property, such bank taking the same, however, with full knowledge of plaintiffs' rights; that since October 22, 1904, defendant bank has assumed and exercised control of said premises, to the exclusion of plaintiffs and has retained the rents and profits thereof; and that the value of said premises is \$2,000, and that the rental value thereof is \$15 per month. As conclusions of law the court found that the deed from plaintiffs to Jensen was merely a mortgage securing the payment to him of \$540 and interest; that the deed from Jensen to defendant bank was taken with full notice of plaintiff Lizzie Smith's interest in the property, and in equity operated as an assignment merely of such mortgage and the indebtedness thus secured thereby, and that the plaintiffs are indebted to the defendant bank in the sum of \$540, with interest at the rate of 7 per cent per annum from February 24, 1904, less the rental value of said premises since the 22d day of October, 1904, at \$15 per month, and the costs of this action, to be taxed by the clerk. It was, among other things, in effect adjudged that defendant bank execute and deliver to plaintiff Lizzie Smith a deed of conveyance of the property within ninety days after the date of the judgment upon payment or tender by plaintiffs of the sum of \$540, with interest at the rate of 7 per cent from February 24, 1904, amounting to \$625, less \$278, the rental value of the property and \$45 costs. It was further adjudged that the failure of plaintiffs or either or them to pay or tender such sum within the time aforesaid should operate to forever debar them of any right, title or interest in said premises, and vest the same in defendant bank. The rules of law applicable to the case are well settled, and there is no serious disagreement thereon between counsel.

This court in *McGuin v. Lee*, 10 N. D. 160, 86 N. W. 1714, quoted with approval the following rule: "There can be no question that a party may make a purchase of lands, either in satisfaction of a precedent debt or for a consideration then paid, and may at the same time contract to reconvey the lands upon the payment of a certain sum, without any intention on the part of either party that the transaction should be, in effect, a mortgage. There is no absolute

rule that the covenant to reconvey should be regarded, either in law or in equity, as a defeasance. The covenant to reconvey, it is true, may be one fact, taken in connection with other facts, going to show that the parties really intended the deed to operate as a mortgage, but standing alone it is not sufficient to work that result. The owner of the land may be willing to sell at the price agreed upon, and the purchaser may also be willing to give his vendor the right to repurchase upon specified terms; and, if such appears to be the intention of the parties, it is not the duty of the court to attribute to them a different intention. Such a contract is not opposed to public policy, nor is it in any sense illegal, and courts will depart from the line of their duty should they, in disregard of the real intention of the parties, declare it to be a mortgage"—citing *Henley v. Hotaling*, 41 Cal. 22; *Conway's Ex'rs v. Alexander*, 7 Cranch (U. S.) 218, 3 L. Ed. 321; *McNamara v. Culver*, 22 Kan. 661.

As to the burden of proof, it is also well settled by this court that, in order to destroy the recitals in a deed or other contract, the proof must be clear, strong and convincing, "and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt." *Jasper v. Hazen*, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58; *McGuin v. Lee*, 10 N. D. 160, 86 N. W. 714; *Wells v. Geyer*, 12 N. D. 316, 96 N. W. 289.

The following rules are statutory in this state:

"Sec. 6151. Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act is to be deemed a mortgage, except when in the case of personal property, it is accompanied by an actual change of possession in which case it is deemed a pledge."

"Sec. 6153. The fact that a transfer was made subject to a defeasance on a condition may, for the purpose of showing such transfer to be a mortgage, be proved, except as against a subsequent purchaser or incumbrancer for value and without notice, though the fact does not appear by the terms of the instrument." Rev. Civ. Code 1905.

It goes without saying that before the grantors in a deed, intended as mere security, can compel a reconveyance, they must pay or tender all the indebtedness due the grantee or his assignee according to the terms of the agreement for such reconveyance. In other words, before such equitable relief will be extended to such

grantors, they must bring themselves within the recognized doctrine of equity jurisprudence that he who seeks equity must first do or offer to do equity. This rule is too well settled to require the citation of authorities in its support. See, however, *Bank v. Tufts et al.*, 14 N. D. 238, 103 N. W. 706, 116 Am. St. Rep. 682, and cases cited; also 2 Current Law, pp. 911-912.

With the foregoing rules in mind, we have carefully examined the testimony in the case at bar and have reached the same conclusion is that arrived at by the trial court, except as to certain findings and conclusions which we will hereafter notice. Upon the principal question of fact in dispute, which is as to whether the deed from plaintiffs to Jensen was an absolute conveyance or merely a mortgage, we entertain no doubt that the same was intended as a mortgage merely. The evidence is clear and convincing that such was the intention of the parties. Both plaintiffs testified positively to this effect, and their testimony is fully corroborated by the other evidence in the record. The testimony is too voluminous to warrant a full statement thereof in this opinion, but we will briefly review the same. The testimony was undisputed that the Smiths were indebted to Jensen in a sum between \$500 and \$600, and that Jensen had caused their personal property to be attached in an action instituted by him against them to recover such indebtedness, and for the purpose of procuring a release of such attachment the deed in question was given. At the time of executing this deed the exact amount of such indebtedness was not known, but it was considered that such indebtedness, including the costs of the attachment suit, would reach the sum of about \$600. It was agreed that, if it was less than that amount, the Smiths would be given credit at Jensen's store for the balance. The consideration mentioned in the deed was therefore fixed at \$600. Immediately after executing the deed, but as a part of the same transaction, a written agreement was executed by Jensen, whereby he agreed to reconvey the premises to Lizzie Smith upon the payment by plaintiffs or either of them to him of \$600 on or before September 1st following. It does not appear that any negotiations had been carried on between these parties prior to the date such deed was executed with reference to the sale and purchase of the property. This in itself is very significant. At the date the alleged sale was made the property was worth a much larger sum than \$600, the testimony being somewhat conflicting as to such

value, but a fair valuation, as shown by the testimony, is \$1,500. In addition to these facts, it appears that the Smiths for a period of about eight months after the deed was executed had the same care and management of the property as they exercised prior thereto. Regarding the character of the deed and contract, the plaintiff Lizzie Smith testified, among other things, as follows: "Q. Do you know whether or not you were indebted to Mr. Jensen on the 24th of February, 1904? A. Yes sir; we were. Q. How, or in what way, did you pay or satisfy that indebtedness about that time? A. We secured him with that building in Kensal [meaning the property in question]. Q. You say you secured the payment of that debt with that building. How did you do that Mrs. Smith? A. Mr. Jensen claimed that we owed him between \$500 and \$600 of a store bill, and he attached our stock, and we secured him with this building to leave the stock. Q. Do you know what kind of an instrument you gave Mr. Jensen at that time? A. He was to assign the property to me when his pay was forwarded to him. Q. When you paid the \$500 or \$600 you owed him? A. Yes, sir." When questioned regarding the contract to reconvey the premises, the witness stated: "I don't know anything further than he was to give back the deed; whenever he got the \$600 forwarded to him, he was to give me back the deed. Q. Have you ever received any other consideration from Mr. Jensen for this property? A. No, sir." The plaintiff James Smith testified: "Q. And you were some indebted to him at that time? A. Yes. Q. On the 24th day of February, 1904? A. Yes, sir. Q. State what Mr. Jensen did towards the collection of that claim that he had against you during the winter of 1904. A. He came there and attached our stuff, and I went to see him, and she—the woman here—and we agreed to give him this building to release that stock to secure him for the store bill until the following fall, and he was to give that building back as soon as we paid him between \$500 and \$600, and he said he didn't know how much the costs would be at that time, but as soon as we paid that money back he would give us the deed back. Q. Do you know whether or not there was a written instrument to that effect at the time the deed was given? A. There was some kind of a writing, but I am no scholar, and I couldn't tell what it was. Q. At the time you and your wife deeded him this building as security, you relied upon his statements that he would return it upon the payment of this \$600? A. Yes, sir." De-

pendant Jensen testified: That at the time the deed was executed the Smiths were indebted to him in a sum between \$550 and \$600 for goods purchased from him, and the costs of the attachment suit, and that the \$600 mentioned as the consideration in the deed was intended to cover such indebtedness. "Q. At or about the time the conveyance was made, was anything said between you and Mr. and Mrs. Smith with reference to a reconveyance to them of the property? A. There was an option with them to repurchase the property on or before September 1st. Q. Was an understanding or an agreement to that effect made by you on the one part and Mrs. Smith on the other at the time the deed was executed, on the same day? A. Yes, sir. After the deed was executed, this deal was entered into. Q. You at that time agreed to reconvey the property to them on the payment of \$600? A. Yes, sir. Q. What was the agreement in case the payment was not made by September 1st? A. The property was to be mine absolutely. Q. Did Mr. Smith come down and talk to you about it [referring to the attachment suit], and try to get some kind of a settlement? A. No; they were never there until the day the papers were made. Q. Didn't they try to get a settlement? A. Yes, sir. Q. Did they that day tell you that they would give you the house and lot, and call the deal square? A. No; I can't recall they did. Q. When Mr. and Mrs. Smith came down on that day, did they tell you they were willing to give you that house and lot to settle that deal? A. Not in those express words. They were willing to give me a deed for the house and lot. Q. For what? A. For what they owed me. Q. And call everything square? A. No, sir. They didn't say that. Q. What did they say? A. After the papers were made out, they wanted option to— Q. Where did you get that word 'option'? Did they talk about options? A. No, but they wanted— Q. I want to know what they said. A. I don't remember. Q. They didn't say 'option,' did they? A. No. Q. You learned that somewhere else? A. That is the way I would express it. Q. What does that word mean? A. My meaning is that it is a privilege. Q. Of what in this case? A. A privilege of them to buy that property back. Q. Simply a privilege to redeem it, was it? A. If you want it that way. I don't know as that would hardly express it. Q. Did Mr. Smith say he wanted an option to get that property back by the payment of \$600? A. No; I think Mrs. Smith said that. Q. In your answer you admit that

on the 24th day of February, 1904, plaintiffs executed and delivered a deed of conveyance of the premises to this defendant; that contemporaneously with the execution and delivery of said deed, that is at the same time and place you entered into an agreement with plaintiffs, under the terms of which you agreed upon the payment of the sum of \$600 to redeed to plaintiffs the said real property; that is true, is it? A. I said that before, haven't I? Q. I don't know whether you did or not. Is that true? A. It is true I promised to redeed that property upon the payment of \$600. Q. Now, Mr. Jensen, how did you arrive at the sum of \$600 being the amount she should repay you to get that deed back, and how did you arrive at the exact amount due you? A. I didn't arrive at any exact amount, because I didn't have the bill of these costs at that time, but I thought \$600 would cover what they owed me. Q. You were willing to let him have some goods, too, at the same time? A. I said, if that was more than my debt, they could trade the balance out. Q. How much did you demand that they owed you at any time since the conveyance of the property? A. A little over \$600, I guess. They got some goods from me that same time. Q. You were holding this real estate, and you intended, if he redeemed this, you intended he should pay you back what he owned you at the time and all costs of this action, and what he traded out? A. I always thought he would pay his honest debts. Q. Answer the question yes or no. You expected him to pay all of it at the time he redeemed? A. I guess I did. Q. You know you did, don't you? A. Yes; he agreed to. Q. In that written instrument you agreed to reconvey to him upon payment of \$600, did you, that lot 13, block 11, Randall's addition to Kensal, N. D. A. Yes, sir. Q. Payment to be made in the fall of 1904? A. It was before September 1st or on September 1st. Q. With interest? A. Yes, sir. Q. She was to pay interest, too? A. Yes, sir. I think it was. I am not certain of that, though. Q. With reference to this agreement by which you were to reconvey on payment of \$600, did that have any reference whatever to the amount that the Smiths owed you before that time? Was it intended to cover what they owed you, or was it simply a sum you agreed upon for which you were willing to reconvey the property to them at that time? A. I set that sum of \$600 because I thought that would cover the indebtedness of the Smiths to me. Q. And they agreed to that sum? A. Yes, sir. Q. You considered, then, and

knew all the time, did you not, that these people, Mrs. Smith and her husband, had a right to redeem that any time before or on the 1st day of September, and take a reconveyance? A. Yes; I understood they had a right to take a reconveyance." The witness Lowden, who was attorney for defendants Jensen and the bank, testified that the deed and contract were executed in his office, and that it was understood that, by payment of \$600 by Mrs. Smith, Mr. Jensen would redeed the property at any time on or before September 1st, but he says this agreement to reconvey was made after the deed was executed and delivered. In this he is not corroborated even by the testimony of Mr. Jensen. The latter's testimony merely tends to show that the contract to reconvey was made after the execution of the deed. We think we are fully warranted under the evidence in holding, as we do, that this contract was entered into simultaneously with the execution and delivery of the deed and was a part of that transaction. Upon cross-examination this witness fully supports this theory. He was asked the following question: "Immediately after that, and contemporaneously with it, as they have pleaded, they made another agreement whereby he was to reconvey that to them if they paid him back the \$600?" to which he answered "Yes." Q. Didn't you think it a little strange if they made an absolute trade to then make another one contradicting it absolutely? A. I didn't think anything about it. Q. You know as a matter of fact they did make an instrument there at the same time and the same day, and a part of the same transaction, to reconvey that property upon payment of \$600? A. Yes, sir. Q. You knew, though, as a matter of fact, that she wanted the property back upon the payment of the \$600, didn't you? A. I did after they talked that matter over. Q. And there was a written instrument drawn to that effect? A. Yes; but before that I thought they were going to absolutely deed." It is therefore perfectly apparent, not only from the testimony of the plaintiffs and the strong circumstantial evidence in corroboration of their testimony, but also from the testimony of the defendant Jensen and his attorney, that this was a mere security transaction.

The facts are similar to those in the recent case of *Rose v. Gandy*, 137 Ala. 329, 34 South. 239, cited in 2 Current Law, 912, wherein it was said: "It will be observed that the case is not one involving the issue whether the conveyances were intended as mortgages or unconditional sales. It is whether from the understanding between

the parties the complainant should have the right to repurchase or to redeem. In other words, whether the deeds were intended as mortgages or conditional sales. It is important that this distinction should not be lost sight of, since the degree of proof required is different; for, when the conveyance is absolute and the controversy is whether the parties contemplated an unconditional sale or a mortgage, the party claiming that it was intended as a mortgage must show by clear and convincing evidence that at the time of its execution it was intended and understood by both parties that it should operate only as a security for a debt. But, where the writings must be departed from in order to ascertain the true transaction between the parties, the rule is not so stringent. While the complainant in the latter case is not relieved of the burden of proving his case, yet the court will be inclined to favor the right of redemption, and therefore to consider the transaction as a mortgage; 'for by this construction complete justice can be done to both parties. The mortgagee is secured in the payment of the money he may have loaned or advanced with its accruing interest, and the mortgagor is protected in his equity of redemption; while if the other construction was adopted, the time limited for the repurchase must be precisely observed or the right to reclaim the property is irretrievably lost. Oppression could be exercised over the needy, and undue advantage taken of their distressed or embarrassed circumstances.' "

It follows as a necessary conclusion that plaintiff Lizzie Smith on the payment or tender of the amount of the indebtedness secured thereby is entitled to a reconveyance of the property, unless the defendant bank purchased the same from Jensen in good faith and without knowledge of the character of the deed aforesaid. The trial court found that the bank had knowledge sufficient to apprise them of the real character of the transaction, and we think this finding was fully warranted by the evidence. Upon this point defendant Jensen testified that at the time he gave the deed to the bank he talked with Mr. Sinclair, the officer of the bank who negotiated the deal, and told him all about the deal. He testified as follows: "Q. Did you tell him anything about the deal you had with Mrs. Smith? A. I think I told him about how Mrs. Smith had a chance to buy that property back for a consideration of \$600. Q. You told him there was a written instrument to that effect? A. I think I told him that. Q. You talked about Mrs. Smith with

Mr. Sinclair—about the property and about the dealings? A. Yes; we talked about it. I told him she had a right to purchase that property back for \$600 before September 1st. Q. You told him all about the deal as you understood it, did you? A. I told him what I knew. Q. If Mr. Sinclair says you didn't tell him anything about that deal at all, he does not tell the truth at all? A. I don't know how good his memory is." It is true the witness Sinclair disputes this testimony, but we are not disposed to find the fact contrary to the findings of the trial court, as he had an opportunity to see the witnesses upon the stand and was better able to judge of their credibility than we are. The deed, therefore, from Jensen to the bank merely operated as an equitable assignment of Jensen's equitable mortgage and the indebtedness secured thereby, and the trial court correctly held that upon the payment or tender of such indebtedness the defendant bank should execute and deliver to the plaintiff Lizzie Smith a deed reconveying said premises. Through an evident oversight, however, the judgment provides that a failure to pay or tender such indebtedness within ninety days from the date of the judgment should operate to debar plaintiffs of any interest in the property, and vest the absolute title in the bank. The transaction constituted merely a mortgage and plaintiff cannot be divested of her ownership against her will, except through foreclosure proceedings, and the judgment will therefore be modified by eliminating therefrom the provision aforesaid.

It is urged by appellants' counsel that plaintiffs have no standing in a court of equity by reason of delay in asserting their rights, and also because they have not paid or tendered to defendant bank the indebtedness secured by such deed. We think such contention without merit. It was unnecessary to pay or tender such indebtedness prior to the commencement of the action. The sum necessary to effect a redemption as well as plaintiff's right to redeem were in dispute, and it was therefore only necessary for plaintiffs in their complaint to offer to do equity by alleging their willingness to pay such sum as may be found due. The rule is as stated in 2 Current Law, 911, and cases cited, "that to maintain an action to have an absolute conveyance declared a mortgage, the plaintiff must offer to redeem. *Mack v. Hill*, 28 Mont. 99, 72 Pac. 307. But tender need not be made prior to commencing suit. *Reese v. Rhodes*, 3 Ariz. 235, 73 Pac. 446; *DeLeonis v. Walsh*,

140 Cal. 175, 73 Pac. 813." In the latter case it was said: "Where defendant denies that he holds as a mortgagee and claims the property as his own, while the amount of the indebtedness secured is also in dispute, an action may be maintained without any previous offer or payment. The judgment should be for a reconveyance on the payment by plaintiff of any balance found due."

The judgment appealed from in so far as it adjudges that said deed is merely a mortgage, and that plaintiff Lizzie Smith is entitled to a reconveyance of the premises upon payment of the net amount due to the bank, was correct and is affirmed; but, in view of the state of the record, this court is unable to determine with any degree of certainty the equitable sum which plaintiffs should be required to pay to entitle the plaintiff Lizzie Smith to a reconveyance of the property. We have therefore concluded to leave this branch of the case open for further adjudication by the trial court. That court is directed to take an account between the parties for the purpose of determining the correct amount of the indebtedness secured by said deed, including interest at 7 per cent per annum, from February 24, 1904, which is due from the plaintiffs to the defendant bank as equitable assignee thereof, and also for the purpose of determining the amount of rents and profits actually received by defendant bank from the property aforesaid, with interest, after deducting therefrom such sums, if any, as the defendant bank or its assignor, Jensen, may have properly paid out or expended for taxes, insurance and repairs, or for the discharge of valid liens thereon, and after deducting the net amount, if any, of such rents and profits from the total amount of such indebtedness, that court is directed to enter judgment in conformity with the foregoing opinion, no costs to be allowed either party on this appeal. All concur.

(114 N. W. 306.)

STATE OF NORTH DAKOTA V. ARNE HUNSKOR.

Opinion filed Feb. 14, 1908.

Criminal Law — Directing Verdict.

1. Appellant was convicted of the crime of shooting at another with a firearm, with intent to do bodily harm. At the conclusion of the state's case, and also at the conclusion of all the tes-

timony, defendant moved that the jury be advised by the court to acquit. *Held*, that these motions were properly denied, there being sufficient evidence of guilt to require a submission thereof to the jury.

Same — Opinion — Evidence.

2. The proof disclosed that the prosecuting witness was in a buggy driving west on defendant's premises and was from 30 to 40 rods from defendant when he fired a rifle. The fact that such shot was fired by defendant was not disputed, but the defense contended that it was discharged upward, and defendant had no intent to shoot the complaining witness. One D. was called, and testified in defendant's behalf that he saw the gun fired, and that it was held in an upward angle, and that defendant did not aim the gun at the complaining witness. The following question was propounded to the witness, and an objection thereto sustained: "How high over the buggy would you estimate that the bullet would go if it were directly over the buggy?" *Held*, for reasons stated in the opinion, that such ruling was not error.

Same.

3. Defendant was asked the question: "Previous to the time you had seen K. [the prosecuting witness] had you been trying to stop the public travel on that road?" *Held* not reversible error in sustaining an objection thereto.

Same — Instructions — Shooting to Prevent Trespass.

4. Defendant requested the giving of the following instructions to the jury: "An assault upon or towards the person of another is not unlawful when used in preventing or attempting to prevent any trespass or other unlawful interference with real property in one's possession, provided the force or violence used is not more than sufficient to prevent such offense." Such request was properly denied. The rule embraced therein had no application to the crime charged. A person is not justified in shooting at another to prevent an ordinary trespass to real property.

Same.

5. Among other things the trial court instructed the jury in effect that they might find defendant guilty whether the gun was shot off by defendant or not, provided they found that he aimed the same at the prosecuting witness with intent so to do. This is *held* reversible error.

Same.

6. Other instructions examined, and *held* properly given.

Same — Sentence.

7. The trial court, in addition to sentencing defendant to imprisonment in the county jail, imposed a fine. This was error, as the

statute under which defendant was convicted prescribes imprisonment merely, either in the penitentiary or county jail.

Appeal from District Court, Bottineau county; *Goss, J.*

Arne Hunskor was convicted of shooting with intent to do bodily harm, and appeals.

Reversed.

Noble, Blood & Adamson, for appellant.

No brief by respondent.

FISK, J. Defendant was tried and convicted in the district court of Bottineau county under an information, the charging part of which is as follows: "That at the same time and place the said defendant did willfully, unlawfully and feloniously, without justifiable or excusable cause, and with intent to do bodily harm to one J. G. Krebs, shoot at said J. G. Krebs with a certain firearm, to wit, a rifle, then and there loaded with powder and ball, with the then and there intent to injure said J. G. Krebs, though without intent to kill said J. G. Krebs or to commit a felony." The verdict of the jury was as follows: "We the jury, find the defendant guilty of assault by shooting at J. G. Krebs with a firearm, and that willfully and unlawfully, as charged in the information." A motion in arrest of judgment was made and denied, and judgment rendered sentencing defendant to imprisonment in the county jail of said county for the period of 60 days and imposing a fine of \$200, and costs of prosecution, taxed at \$175, in default of the payment of which defendant was adjudged to be imprisoned for the further period of six months. Thereafter a statement of the case was duly settled, and a motion for a new trial was made and denied, and from such judgment and the order denying a new trial this appeal is prosecuted.

Appellant has assigned numerous errors upon which he asks a reversal of the judgment and order appealed from. These will be considered in the order presented. At the close of the state's case, and also at the close of all the evidence, defendant moved the court to advise the jury to acquit, and error is assigned upon the court's refusal to grant such motions. We have examined the evidence with much care, and are of the opinion that no error was committed in the denial of these motions. Without detailing the tes-

timony at length in this opinion, it is sufficient to say that we are clearly of the opinion that there was enough evidence of guilt to require a submission thereof to the jury, and hence that the trial court properly denied such motions.

The next assignment of error relates to the ruling of the trial court in sustaining an objection to the following question propounded to the witness Brock De Clue: "How high over that buggy would you estimate that the bullet would go if it were directly over the buggy?" A brief statement of the preceding testimony is necessary to a proper understanding and determination of this assignment of error. The state had introduced testimony tending to prove that, while the prosecuting witness and his wife and child were in a buggy driving west from defendant's house in defendant's field at a distance of from 30 to 40 rods from such house, defendant, who was near his house, shot at them with a rifle. The theory of the defence was that defendant did not shoot at the prosecuting witness, but merely shot such rifle off to scare the witness, and that he took no aim, but fired upwards or at the side of the prosecuting witness. We think such ruling is not reversible error, for three reasons: First, the witness had already testified that defendant held the gun in an upright angle when he fired, and that he did not aim the same at the prosecuting witness; and, second, the distance the bullet would pass over the buggy, if it passed over it, was necessarily a mere conclusion and opinion of the witness; and, third, no offer of proof having been made by defendant, error cannot be predicated thereon. *Madson v. Rutten* (N. D.) 113 N. W. 872, and cases cited.

The third assignment of error, is, we think, wholly devoid of merit. It relates to the ruling of the trial court in sustaining an objection to the following question asked defendant: "Previous to the time you had seen Mr. Krebs, had you been trying to stop the public travel on that road?" How a favorable answer to this question could possibly have any bearing upon the guilt or innocence of the defendant we are at a loss to understand. Certainly an affirmative answer would have furnished no excuse or justification for the crime charged. At the most such an answer might have furnished in some slight degree a mitigating circumstance, but, as before stated, no offer of proof having been made, error cannot be predicated thereon.

The next assignment of error is based upon the refusal of the court to give the following instruction requested by the defendant: "An assault upon or toward the person of another is not unlawful when used in preventing or attempting to prevent any trespass or other unlawful interference with real property in one's possession, provided the force or violence used is not more than sufficient to prevent such offense." Such request was properly denied. It would, no doubt, have been proper, if the accused was charged with merely a simple assault, but it had no relevancy to the offense charged in the information, and for which the defendant was on trial. That a person is not justified in shooting at another with a Winchester rifle or any other firearm in order to prevent an ordinary trespass to real property ought not to be seriously questioned in a court of law.

This brings us to the assignments relating to the instructions given to the jury by the trial court. Among other things the court charged the jury as follows: "In this action the defendant is charged in the information filed by the state's attorney with the crime of willfully and unlawfully and feloniously, without justifiable or excusable cause, and with the intent on the part of the defendant to assault one J. G. Krebs with a firearm, without the intent on the part of the defendant to kill said Krebs or commit a felony." This portion of the instructions is an attempt to inform the jury of the nature of the charge against the defendant. It is true that such attempt was very poorly executed and was technically inaccurate; but we are unable to see how the jury was misled thereby, or how the same in any way constitutes prejudicial error, especially in view of the remainder of the charge. It is, however, quite apparent that the learned trial judge did not fully appreciate and understand the exact nature of the accusation against the defendant. It was not for an assault or assault and battery upon another with a dangerous weapon with intent to do bodily harm, but it was for willfully and feloniously shooting at another with a firearm, with intent to injure such other. See *State v. Cruikshank*, 13 N. D. 337, 100 N. W. 697.

The defendant also complains of that portion of the instructions wherein the court charged that he might be found guilty of simple assault; but, in view of the fact that he was not convicted of such lesser offense, we do not see how error can well be predi-

cated thereon, and whether the giving of such instruction was error or not is wholly immaterial.

Another instruction complained of is that wherein the jury were charged in effect that they might find the defendant guilty whether the gun was shot off by defendant or not, provided they find that he aimed the same at the prosecuting witness with intent so to do. Why this instruction was given we cannot understand, as we fail to find any basis therefor in the testimony. It seems to have been conceded that defendant discharged the rifle, and the sole controversy throughout the trial was as to whether he shot at or intended to shoot at the prosecuting witness. The giving of this instruction is another evidence of the fact that the trial court was laboring under a misapprehension as to the nature of the accusation. The evident object of this instruction was to inform the jury that the offense of assault with a dangerous weapon was proven if the defendant merely aimed this loaded rifle at the witness with intent to shoot him; but, as before stated, the charge in the information was not an assault with a dangerous weapon, but it was and is the shooting at another with a firearm with the felonious intent to injure the person shot at. We are unable to say that the giving of such instruction did not mislead the jury, and hence we are constrained to hold that the same constitutes error necessitating a new trial.

The jury were instructed that in arriving at their verdict they should not consider the fact that the prosecuting witness was trespassing upon defendant's premises, except in so far as it bears upon the defendant's intent in shooting off such firearm. We see no error in the giving of this instruction. As before stated, a mere trespass to real property is no excuse or justification for the use of a deadly weapon to prevent the same.

The next assignment of error relates to the style or form of the blank verdicts submitted to the jury. While the verdict which was submitted to and returned by the jury is not a desirable model, we are not prepared to say that it should not be sustained in the absence of other reversible error; but we think the better practice requires that a verdict should embrace a finding of the essential and ultimate facts constituting the crime charged.

One other assignment remains to be considered. The trial court sentenced the defendant to pay a fine and the costs in addition to imprisonment in the county jail. This was clearly error.

The statutory punishment for the offense of which defendant was convicted does not include a fine, but is restricted to imprisonment either in the penitentiary or county jail. Section 8876, Rev. Codes 1905.

For the error in the instruction above mentioned, the judgment and order appealed from are reversed, and a new trial ordered. All concur.

(114 N. W. 996.)

THE STATE OF NORTH DAKOTA V. JOHN B. HAZLET.

Opinion filed Oct. 18, 1907.

Homicide — Burden Never Shifts to Defendant to Establish a Defense by Preponderance of Evidence — Justification or Excuse — Statutory Provision.

1. Upon the trial of a person charged with murder, and in which one of the defenses relied on is justifiable homicide, or self-defense, it is prejudicial error to instruct the jury that the burden of proof is upon the defendant to establish such defense by a preponderance of the evidence. The burden never shifts to the defendant to establish by a preponderance of the evidence either facts and circumstances in mitigation or excuse, or facts establishing an affirmative defense. But under section 10,023, Rev. Codes 1905, where the commission of such homicide has been established by the state, the burden is upon defendant of proving circumstances of mitigation, excuse, or justification, unless the state's proof tends to show that such crime only amounts to manslaughter, or that defendant's act was justifiable or excusable. But this does not mean that defendant is required to do more than show circumstances creating a reasonable doubt as to such matters.

Same — Court Must Instruct Upon all Defenses Supported by the Evidence Whether Consistent or Inconsistent.

2. A defendant in a criminal action is entitled to have submitted to the jury, with proper instructions, all defenses of which there is any support in the evidence, whether such defenses are consistent or inconsistent. It is accordingly *held* that the trial court properly instructed the jury upon the theory of accidental killing as well as that of justifiable homicide.

Excusable Homicide — Accidental Killing — Burden of Proof — Reasonable Doubt.

3. The defense of accidental killing was not an affirmative defense in the sense that defendant was bound to furnish proof of circum-

stances tending to substantiate the same. It is a denial of criminal intent, and the burden was upon the state of proving such intent beyond a reasonable doubt.

Evidence — Proof of Other Offense.

4. It was prejudicial error to permit the state to prove that the defendant had committed the crime of sodomy. Proof of such crime in no way tended to prove defendant's guilt of the crime charged against him. The rule announced in *State v. Kent*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518, is *held* not applicable to the case at bar.

Instruction — Accused's Statements out of Court.

5. The trial court charged the jury that, if they believed from the evidence that the defendant had made statements out of court against himself, they had a right to treat such statements as true or false, just as they believed them true or false when considered in the light of all the other facts and circumstances in the case. *Held*, not error.

Homicide — Apprehension of Danger — Reasonableness of Defendant's Belief — Instruction.

6. The trial court charged the jury as follows: "It is not enough that the party killing another believed himself in danger from the person killed, unless the facts were such that the jury, in the light of all the facts and circumstances known to the slayer or believed by him to be true, can say he had reasonable ground for such belief." *Held*, correct. But *held*, further, that defendant's conduct is not to be judged by what a reasonable cautious person might or might not do or consider necessary to do under like circumstances, but what he himself, in good faith, honestly believed and had reasonable grounds to believe was necessary for him to do to protect himself from apprehended death or great bodily injury. The reasonableness of defendant's belief must be determined from his standpoint, and not from the standpoint of an ideal, reasonable person. (Spalding, J., dissents from the reasons given for sustaining said instructions.)

Same — Heat of Passion — Cooling Time — Defendant Judge of the Situation.

7. Where the evidence shows that a homicide was committed in the heat of passion and with provocation, the jury, in determining whether there was sufficient cooling time for the passion to subside and reason to resume its sway, should be governed, not by the standard of an ideal reasonable person, but from the standpoint of the defendant in the light of all the facts and circumstances disclosed by the evidence. Whether there was cooling time is a question varying with each particular case and with the temperament of the party and it is accordingly *held* that the instructions given by the trial court

upon this subject constituted prejudicial error. (Spalding, J., dissenting.)

Same — Evidence.

8. Certain rulings of the trial court in the admission and rejection of testimony examined, and *held*, prejudicial error.

Appeal from District Court, Sargent county; *Allen, J.*

John B. Hazlet was convicted of murder in the first degree, and he appeals.

Reversed, and new trial ordered.

W. S. Lauder and *S. A. Sweetman*, for appellant.

The New York and California cases relied upon in *State v. Yokum*, 79 N. W. 835, upon which the trial judge based his instructions, and *U. S. v. Crow Dog*, 3 Dak. 106, do not apply; and the true rule is, if from the whole case, including the killing, the presumption of fact arising therefrom, and the evidence of justification, the jury entertain a reasonable doubt, as to the defendant's guilt, they must acquit him. Section 10023, Rev. Codes 1905; *People v. Neary*, 37 Pac. 943; *People v. Powell*, 25 Pac. 481; *State v. Conahan*, 38 Pac. 996; *People v. Elliot*, 22 Pac. 207; *People v. Scott*, 56 Pac. 102; *People v. Lanagan*, 22 Pac. 482; *People v. Dillon*, 30 Pac. 150; *People v. Tidwell*, 12 Pac. 61; *People v. Callaghan*, 6 Pac. 49; *Barton v. Territory*, 85 Pac. 730; *State v. Earnest*, 42 Pac. 359; *Kent v. People*, 9 Pac. 852; *People v. Susser*, 75 Pac. 1093; *Trumble v. Territory*, 21 Pac. 1081; 6 L. R. A. 384; 6 Enc. of Evidence, 593, 597; *People v. Downs*, 25 N. E. 988; *People v. Riordan*, 22 N. E. 455; *People v. Stokes*, 53 N. Y. 164; *Brotherton v. People*, 75 N. Y. 159; *O'Connell v. People*, 87 N. Y. 377; *People v. Pallister*, 33 N. E. 741; *People v. Shanley*, 63 N. Y. Supp. 499; 21 Cyc. p. 882, note 76; *State v. Bone*, 87 N. W. 507; *State v. Shea*, 74 N. W. 687; *State v. Schweitzer*, 6 L. R. A. 125; *State v. Usher*, 102 N. W. 101; *Copps v. State*, 97 N. W. 210; *Lillianthol Tobacco Co. v. U. S.*, 97 U. S. 266, 24 L. Ed. 901; *Boykin v. People*, 45 Pac. 419; *Wascaser v. People*, 25 N. E. 564.

The court should have charged that the defendant should not be convicted if upon the whole case, the jury entertained a reasonable doubt of his guilt. *People v. Downs*, 25 N. E. 988; *Tilley v. State*, 24 Tex. App. 251; 5 Am. St. Rep. 882.

Instruction as a whole must be consistent and not misleading. 1 Blashfield on Instructions, sections 73 to 78, and note 93.

Upon a trial for one offense, proof that accused committed another is inadmissible. *Ferris v. People*, 129 Ill. 521, 16 Am. St. Rep. 283; *State v. Raymond*, 53 N. J. L. 206, 2 Am. St. Rep. 405; *People v. Molineux*, 61 N. E. 286; *People v. Meyers*, 15 Pac. 95; *People v. Sharp*, 14 N. E. 319; *Shaffer v. Commonwealth*, 77 Pa. St. 63; *Martin v. Commonwealth*, 19 S. W. 580; *Cotton v. State*, 17 So. 372; *State v. Kent*, 5 N. D. 516, 67 N. W. 1052.

The test of justification is, whether accused in good faith did believe that the danger was imminent, and acted honestly in that belief. *Wharton on Crim. Law* (8th Ed.) 488; *People v. Lennon*, 15 Am. St. Rep. 259.

Assuming that defendant intentionally killed deceased under provocation, the question for the jury is not whether a reasonable time had elapsed for an *ordinary* man to cool, but whether the *defendant himself* had in fact cooled. 1 *Wharton on Crim. Law*, (8th Ed.) 480; *State v. Grugin*, 71 Am. St. Rep. 553.

T. F. McCue, Attorney General, *E. W. Bowen*, State's Attorney, and *Chas. E. Wolfe*, for respondent.

It is competent to prove motive for homicide. *Rice on Crim. Evidence*, 447, Par. 281.

A separate offense, when allied to the motive in the homicide may be proven. *State v. Kent*, 5 N. D. 550, 67 N. W. 1052, 35 L. R. A. 518.

The instruction, "it must appear that the circumstances were sufficient to excite the fears of a reasonable man and the party killing acted under the influence of those fears," is correct. 2 *Blashfield on Instructions to Juries*, par. 1516; *Mize v. State*, 36 Ark. 661; *State v. Stockton*, 61 Mo. 382; *Wall v. State*, 51 Ind. 543; *Thompson v. State*, 54 Ga. 47; *State v. Usher*, 111 N. W. 811; *Judge v. State*, 58 Ala. 406; *Davis v. People*, 88 Ill. 350; *Jackson v. State*, 6 Baxter, Tenn., 452; *State v. VanSant*, 80 Mo. 67; *Crews v. People*, 120 Ill. 317; *Close v. Cooper*, 34 Ohio St. 98.

The instruction as to "cooling time," was correct. 2 *Blashfield on Instructions*, Par. 1505; *State v. Shelleday*, 8 Iowa, 485; *State v. Cants*, 1 Spear S. C. 384; *Kilpatrick v. Commonwealth*, 31 Pa. 198; *Smale v. Commonwealth*, 91 Pa. 304.

Instruction as to burden of proof was correct. Rev. Codes 1905, section 10023.

This section is from California and was approved in *People v. Milgate*, 5 Cal. 127; *People v. Stonecifer*, 6 Cal. 405; *People v. Hong Ah Duck*, 61 Cal. 387.

The adoption of a statute of a sister state, brings with it the construction placed upon it by the latter. *Oswald v. Moran*, 8 N. D. 111, 77 N. W. 281; *Cass County v. Security Improvement Co.*, 7 N. D. 528, 75 N. W. 775; *Stutsman Co. v. Wallace*, 142 U. S. 293, 12 L. Ed. 227; *People v. Ritchie*, 12 Utah, 193.

Subsequent reversal of a decision construing a statute by the state of its origin, is without effect in the state of adoption. *Stutsman Co. v. Wallace*, *supra*; *Barnes v. Lynch*, 59 Pac. 995.

When defendant seeks to prove a fact in opposition to the presumption of guilt arising from the proof or admission of the homicide, he must do so "to the satisfaction of the jury by a preponderance of the evidence." *People v. Schryver*, 42 N. Y. 1; *State v. Yokum*, 79 N. W. 835; *State v. Schmidt*, 19 S. D. 585; *Tanks v. State*, 71 Ark. 459; *Alderman v. Territory*, 60 Pac. 876; *People v. Mathai*, 67 Pac. 694; *Kent v. People*, 9 Pac. 852; *Murphy v. People*, 37 Ill. 447; *Territory v. Rowland*, 8 Mont. 110; *People v. Tidwell*, 4 Utah, 49; *State v. Bertrand*, 3 Or. 61; *Dixon v. State*, 13 Fla. 663; *Bell v. State*, 69 Ga. 752; *State v. Tabor*, 95 Mo. 585; *State v. Keith*, 9 Nev. 15; *State v. Barringer*, 19 S. E. 275; *Commonwealth v. Drum*, 58 Pac. 9; *Gibson v. State*, 89 Ala. 121; *Commonwealth v. Webster*, 59 Mass. 295; *Hawthorne v. State*, 58 Miss. 778.

FISK, J. Appellant, having been convicted in the district court of Sargent county of the crime of murder in the first degree, and sentenced to imprisonment in the penitentiary for life, brings the case to this court for review of alleged errors of law claimed to have been committed by the trial court in giving certain instructions to the jury and in refusing to give certain other instructions requested by his counsel; also in making certain rulings relating to the admission and rejection of testimony. Eighty-two assignments of error are set forth in appellant's brief, but we will notice those only which have been discussed therein, treating those not discussed as abandoned under rule 14 of this court.

We will dispose of these assignments in the order in which they are presented in appellant's printed brief, first calling attention

to a few of the salient facts which are apparently not in dispute and which are narrated in the brief of appellant's counsel, as follows: "It is uncontradicted that at about the hour of 9 o'clock a. m. of the 16th day of March, 1906, the deceased went from his home to a small butcher shop in the village of Veda. So far as known, he had no business there, but went simply to visit with the young man in charge of the place. It is conceded that at the time he had a loaded revolver on his person. About 9:30 o'clock defendant also called at this same butcher shop. It was, and is, claimed by the defense that the defendant called at the butcher shop on business, and that at the time he did not know that the deceased was there. On going to the butcher shop, the defendant carried with him a loaded shotgun. His purpose in taking the gun with him, as claimed by defendant, appears in the testimony. It is uncontradicted that immediately upon defendant entering the room a quarrel arose between defendant and deceased; that the shotgun which at the time was in the hands of defendant, was discharged, and the deceased instantly killed. On behalf of the defendant, it was contended: First, that the deceased attempted to take the gun from the possession of the defendant, and that while the two were struggling for the possession of the gun it was accidentally discharged, and deceased was killed; and, second, that if defendant consciously and intentionally fired off the gun, he did so in necessary self-defense. The two men had been personal enemies for some time prior thereto, and the deceased had made frequent and vicious threats against the life of defendant."

The first error assigned is predicated upon the giving of the instruction relative to the burden of proof as to the questions of excusable and justifiable homicide, as follows: "If, in this case, therefore, the killing by the defendant of Van Buskirk has been proved to your satisfaction beyond a reasonable doubt, then the burden of proving circumstances of mitigation, or circumstances that justify or excuse that killing, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justified or excusable. Under such circumstances, the defendant must prove circumstances in mitigation, excuse, or justification by a preponderance of the evidence, and it is not sufficient that the proof as to such circumstances raises a reasonable doubt as to such mitigation, excuse or justification.

In other words, with the exceptions just stated, when a man takes human life, and the killing is proved or admitted, and he claims justification, as that the killing was in self-defense, or that it was excusable, as that the killing was accidental, it is not sufficient for him to raise a reasonable doubt whether he was justified or excusable or not, but he must go one step further, and give satisfactory evidence that he was justified or excused." Upon the same subject, appellant's counsel asked for, and the court refused, the following instruction: "The rule of law that the defendant must be acquitted unless a jury are satisfied as to his guilt beyond a reasonable doubt applies with equal force to self-defense, and if the jury, upon the whole case, entertain a reasonable doubt as to whether the defendant killed the deceased in self-defense, you must give the defendant the benefit of the doubt, and acquit him."

To the giving of the first instruction, and to the refusal to give the latter, exceptions were duly taken and preserved in the record. These assignments of error will be considered together. We entertain no doubt that the giving of the instruction complained of, and the refusal to instruct as requested, was prejudicial error requiring a reversal of the judgment and the ordering of a new trial. The instruction asked for correctly stated the law, and the instruction given was clearly erroneous, according to the overwhelming weight of authority, as well as upon principle and reason. The question of justifiable, as well as excusable, homicide, as properly held by the trial court, was, under the evidence, necessarily in the case. It is, we think, a well-established rule in criminal jurisprudence that a defendant is entitled to have submitted to the jury, with proper instructions, all defenses of which there is any support in the evidence, whether such defenses are consistent or inconsistent. That there was evidence sufficient to require submission to the jury of the questions both of excusable and justifiable homicide we think clearly appears from an examination of the record. In a recent case in the Court of Appeals of New York, under facts similar to those in the case at bar, the rule was distinctly, and we think correctly, announced, that the question of self-defense was raised, notwithstanding the fact that defendant contended that the shot which killed deceased was fired accidentally, and that it was the court's duty to charge the jury fully upon the law of self-defense. We quote from the opinion: "It is true

that in a portion of her testimony she characterized the killing as accidental, and it was upon the theory of a defense of accidental killing that the trial judge based his ruling (excluding evidence of self-defense); but what she may have said to that effect in response to questions put by the trial judge or by counsel must be taken in connection with her previous statements. She had testified that she sought to prevent his getting possession of the weapon because of her apprehension that he would use it upon her, and that she believed from the language used toward her that he was going to take her life. Upon her testimony, the facts were that the deceased was killed while they were struggling for the possession of the weapon, and that she was justified, by reason of her fear, in resisting his efforts to obtain it, from which it would follow, whether it was discharged by her intentionally or an accident of the struggle, that she was not liable to the charge in the indictment. She may have believed, or upon reflection may now believe, that the killing was an accidental incident; but, under her plea of not guilty how can she be deprived of any evidence tending to acquit her on the ground that she was acting under apprehension of great bodily harm? Such a ruling would be neither just nor human." *People v. Taylor*, 177 N. Y. 237, 69 N. E. 534.

Having reached the conclusion, as we do, that defendant had a right to have the question of self-defense submitted to the jury, we will briefly consider the instructions given and refused relative to the burden of proof as to such defense. Section 10023, Rev. Codes 1905, provides: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolve upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." The respondent's counsel, as well as the trial court, evidently rely, in support of the instruction complained of, upon the above section as construed in the case of *State v. Yokum*, 11 S. D. 544, 79 N. W. 835, and certain early decisions of California and one in Dakota Territory, also *People v. Schryver*, 42 N. Y. 4, 1 Am. Rep. 480, construing the same or a similar statute. If the construction of this statute as announced by our sister state of South Dakota in *State v. Yokum* and as contended for by respondent's

counsel, be sound, then there is no escape from the logic of appellant's argument that in all cases, in which the facts and the issues are similar to those in the case at bar the burden is, in effect, cast upon defendant to prove his innocence. If, as the trial court charged the jury, "it is not sufficient for him [defendant] to raise a reasonable doubt whether he was justified or excusable or not, but he must go one step further and give satisfactory evidence that he was justified or excused," then it is too plain for discussion that defendant not only has the burden of bringing forth evidence sufficient to create a reasonable doubt as to his guilt because of matters relied upon in excuse or justification, but he is required to satisfactorily prove the truth of the defense thus relied upon, and consequently to prove his innocence, by a preponderance of the evidence or by satisfactory proof. With due deference to the few decisions to the contrary, we do not think such a construction is warranted by the language used in the statute. Under the terms of the section aforesaid, if the proof on the part of the prosecution tends to show that the defendant's act was excusable or justifiable, there is no burden cast upon defendant of proving anything. Such being the express provisions of the section, we are at a loss to understand upon what process of reasoning it can be said that, where the proof on the part of the prosecution does not tend to show any circumstances of justification or excuse, the burden is upon defendant to do more than furnish such proof. In other words, a fair and reasonable construction of this statute, as we construe it, is that there must be circumstances disclosed by the evidence which tend to show justification or excuse; and that where the state's case does not disclose such circumstances, the burden devolves upon defendant to disclose the same. But requiring proof of circumstances tending to show a fact is not the equivalent of requiring proof of the fact itself. If a defendant is required to prove the fact that the killing was justifiable or excusable, he is thereby necessarily required to prove his innocence.

The authorities cited and relied upon by the Supreme Court of South Dakota in *State v. Yokum*, *supra*, are, in our opinion, without support on principle, and are opposed to almost the unanimous holdings of the courts of this country. Moreover, at the time this decision was rendered, the early California cases, as well as *People v. Schryver*, *supra*, therein cited, had been overruled by later decisions in these states. See *People v. Bushton*, 80 Cal. 160,

22 Pac. 127, and *Stokes v. People*, 53 N. Y. 164. In *People v. Bushton*, the Supreme Court of California, in considering the correctness of an instruction almost identically the same as the one in the case at bar, said: "The section casts upon the defendant the burden of proving circumstances of mitigation, or that justify or excuse the commission of the homicide. This does not mean that he must prove such circumstances by a preponderance of the evidence, but that the presumption that the killing was felonious arises from the mere proof by the prosecution of the homicide, and the burden of proving circumstances of mitigation, etc., is thereby cast upon him. He is only bound under this rule to produce such evidence as will create in the mind of the jury a reasonable doubt of his guilt of the offense charged. * * * It can make no difference whether this reasonable doubt is the result of evidence on the part of the defendant tending to show circumstances of mitigation, or that justify or excuse the killing, or from other evidence coming from him or the prosecution. The well-settled rule that a defendant shall not be convicted unless the evidence proves his guilt beyond a reasonable doubt applies to the whole and every material part of the case, no matter whether it is as to the act of killing, or the reason or manner of its commission. The section under consideration was not intended to and does not change the rule as to the weight of the evidence. It simply provides that, certain facts being proved, the presumption of guilt shall follow, unless the defendant himself proves certain other facts. It does not attempt to provide the degree of proof required of him, but leaves the rule as to the degree of evidence necessary to convict as it was before. The jury should have been instructed that the burden of proving circumstances of mitigation or that justify or excuse the killing devolves upon the defendant; but that if upon the whole case they entertained a reasonable doubt from the evidence as to his guilt, he should be acquitted. Any other rule as to the weight of the evidence makes one measure applicable to one part of the case, and a different one to another part, and leads to confusion. In justice to the learned judge of the court below, we must say that the instruction given is warranted by some of the decisions of this court, * * * but on mature consideration we feel constrained to hold that they were based upon an erroneous construction of section 1105 of the Penal Code." In *Stokes v. People*, *supra*, *Rappalo, J.*, made use of the following apt language in

disposing of a similar question: "It is a cardinal rule in criminal prosecutions that the burden of proof rests upon the prosecutor; and that if, upon the whole evidence, including that of the defense as well as of the prosecution, the jury entertain a reasonable doubt of the guilt of the accused, he is entitled to the benefit of that doubt. The jury must be satisfied on the whole evidence of the guilt of the accused, and it is clear error to charge them, when the prosecution has made out a *prima facie* case, and the evidence has been introduced tending to show a defense, that they must convict, unless they are satisfied of the truth of the defense. Such a charge throws the burden of proof upon the prisoner and subjects him to a conviction, though the evidence on his part may have created a reasonable doubt in the minds of the jury as to his guilt. Instead of leaving it to them to determine upon the whole evidence whether his guilt is established beyond a reasonable doubt, it constrains them to convict, unless they are fully satisfied that he has proved his innocence."

The correctness of the rule announced in these cases has never since been questioned in those states, but, on the contrary, they have repeatedly been adhered to in numerous later decisions which we will hereafter cite. The case of *United States v. Crow Dog*, 3 Dak. 106, 14 N. W. 437, was based upon those early decisions, which, as we have above seen, have been overruled. The correct rule is so firmly settled that we deem it unnecessary in this opinion to cite all of the authorities in support thereof, but we call attention to the following: *People v. Neary*, 104 Cal. 373, 37 Pac. 943; *People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; *People v. Scott*, 123 Cal. 434, 56 Pac. 102; *Barton v. Territory (Ariz.)* 85 Pac. 730; *People v. Downs*, 123 N. Y. 558, 25 N. E. 988; *People v. Riordan*, 117 N. Y. 71, 22 N. E. 455; *People v. Pallister*, 138 N. Y. 601, 33 N. E. 741; *People v. Shanley*, 49 App. Div. 56, 63 N. Y. Supp. 449; *State v. Conahan*, 10 Wash. 268, 38 Pac. 996; *State v. Earnest*, 56 Kan. 31, 42 Pac. 359; *Trumbull v. Territory*, 3 Wyo. 280, 21 Pac. 1081, 6 L. R. A. 384; *Appleton v. People*, 171 Ill. 473, 49 N. E. 708; *Gravely v. State*, 38 Neb. 871, 57 N. W. 751; *Peyton v. State*, 54 Neb. 188, 74 N. W. 597; *State v. McGarry*, 111 Iowa, 709, 83 N. W. 718; *State v. Usher*, 127 Iowa, 287, 102 N. W. 101; *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200; *Boykin v. People*, 22 Colo. 496, 45 Pac. 419; 21 Cyc. pp. 881-883, and cases cited; 25 Am. & Eng. Enc. Law (2d.

Ed.) p. 283, and cases cited; 5 Am. & Eng. Enc. Law (2d Ed.) p. 33, and cases cited. In *People v. Shanley*, 63 N. Y. Supp. 449, 49 App. Div. 56, the true rule is tersely stated as follows: "When the people have made a case which establishes the guilt of the defendant beyond a reasonable doubt, it may always be said that the defendant is called upon to answer, and in a sense it may be said that he is required to establish, his defense. In this sense he bears a burden; but he is not required to satisfy the jury of anything. If his proof falls short of establishing justification, it may be sufficient to establish a defense by creating a reasonable doubt of his guilt, and if it comes to this extent he is entitled to an acquittal."

The giving of the foregoing instruction was clearly prejudicial error for another reason. It was contended by defendant that the deceased met his death through an accidental discharge of the gun while they were struggling for its possession. This was not an affirmative defense in the sense that defendant was bound to furnish proof of circumstances tending to substantiate the same. As stated in 21 Cyc. p. 884: "The defense that the homicide was accidental is in no sense an affirmative defense. It is a denial of criminal intent, and throws upon the prosecution the burden of proving such intent, beyond a reasonable doubt, and the accused is not required to sustain such defense by a preponderance of the testimony"—citing *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661, and *State v. Cross*, 42 W. Va. 253, 24 S. E. 996. But even if it could be considered an affirmative defense in the sense that self-defense is an affirmative defense, what we have heretofore said regarding the burden of proof would be applicable thereto, and we do not think that such error was cured by the following instruction: "And I charge you, further, that you cannot find the defendant guilty unless you find beyond a reasonable doubt that he actually and intentionally fired the shot which caused the death. If you have a reasonable doubt as to whether the gun was discharged accidentally or discharged by the conscious intentional act of defendant, you must give the defendant the benefit of such doubt and acquit him." The jury may well have understood from the other instruction that they were not at liberty to acquit the defendant unless he proved by a preponderance of the evidence or by satisfactory evidence that the accident occurred as he claimed, viz., by an accidental discharge of the gun.

What we have said regarding the degree of proof required by a defendant to show circumstances tending to prove justification applies, of course, equally to proof of circumstances in mitigation of the offense charged. In order to reduce the degree of the crime from murder in the first degree, as charged, to that of a lesser offense, the burden was not upon the defendant to show by a preponderance of the evidence, or by satisfactory evidence, such mitigating circumstances. It was merely incumbent upon him, where such mitigating circumstances were not disclosed by the state's case, to furnish evidence tending to show the same, sufficient to raise in the minds of the jury a reasonable doubt from the whole evidence as to the degree of the crime. In other words, what we have said in regard to proof of circumstances tending to show justification of defendant's act applies equally to matters tending to show mitigation thereof. This disposes of two of appellant's most important assignments of error; but, in view of the fact that a new trial is to be had, we will briefly notice his other assignments.

The state was permitted, over defendant's objection, to show that defendant had committed the crime of sodomy. If this ruling was error, it requires no argument to show that it was prejudicial. It certainly was well calculated to arouse prejudice in the minds of the jury against the defendant. As stated by appellant's counsel: "This evidence was, as to the defendant, simply paralyzing." "The inevitable effect of this testimony was to inflame the minds of the jury against the defendant, to excite their indignation, and to rouse their hatred." Did the court err in admitting this testimony? The general rule is that evidence that the defendant on trial has committed other crimes is irrelevant. *Farris v. People*, 129 Ill. 521, 21 N. E. 821, 4 L. R. A. 582, 16 Am. St. Rep. 283; *State v. Raymond*, 53 N. J. Law, 260, 21 Atl. 328; *People v. Sharpe*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851; *People v. Molineaux*, 168 N. Y. 264, 292, 309, 310, 61 N. E. 286, 62 L. R. A. 193; *People v. Meyer*, 73 Cal. 548, 15 Pac. 95. To this general rule there are certain well-recognized exceptions, as where the collateral crime is so related to or connected with the one for which the defendant is on trial that proof of the former furnishes some evidence of the commission of the latter, and also where such collateral crime furnishes evidence of a motive for the commission of the latter. Other exceptions to the general rule are also recognized, but it is unnecessary here to refer to them. See 12 Cyc.

406-412, and cases cited; also, *People v. Molineaux*, supra. Respondent's counsel seek to justify the introduction of this testimony upon the ground that it tended to show a motive for the commission of the crime charged, and they rely upon the opinion of this court in *State v. Kent*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518, as supporting the ruling of the trial court in admitting the same. In the *Kent* Case, it was said: "There is ample authority for the proof of collateral crimes for the purpose of showing a motive for the commission of the crime for which the defendant is being tried; the limitation being that such collateral crime must bear such a relation to the crime for which the party is being tried that a court can clearly see that, if established, it will have a tendency to furnish a motive for the commission of the other crime. * * * The proof of the commission of the crime or crimes at Medina, Ohio, would not, as we view it, have any legal tendency to furnish a motive for the murder of Mrs. Kent, but for the declared state of mind, according to Swidensky's testimony, under which Kent was laboring." In that case the ruling of the trial court in admitting such testimony was sustained upon the ground that it tended to show a motive on Kent's part to murder his wife in order to shield himself from exposure and consequent disgrace and punishment for the commission of a crime or crimes committed many years previous thereto at Medina in the state of Ohio. As stated by the court, the facts of the case were unusual. There was no direct testimony connecting defendant with the crime except that of the witness Swidensky, an accomplice, who testified to a conspiracy entered into at the solicitation of Kent to commit such crime; he having testified to statements made to him by Kent as to the latter's motives for such conspiracy. Kent on direct examination flatly denied Swidensky's testimony in all particulars and denied any connection with the crime. Upon cross-examination he was required, over objection, to state the facts complained of, and this court held that the testimony was competent and relevant for the purpose of corroborating Swidensky's testimony relative to Kent's complicity in the crime and his motive therefor. The court said, however, that "the proof of the commission of the crime or crimes at Medina, Ohio, would not, as we view it, have had any legal tendency to furnish a motive for the murder of Julia C. Kent, but for the disclosed state of mind, according to Swidensky's testimony, under which Kent was laboring."

While the decision in that case, under the particular facts there disclosed, was no doubt sound, we think the exception to the general rule forbidding the proof of collateral offenses was carried to its utmost limit, and we are not disposed to enlarge upon its application as there applied. We are convinced that the facts in the case at bar do not warrant the application of such exception. The facts in the two cases are radically different, and the reasons given by this court in the Kent case for applying the exception to the rule are absent in the case at bar. As we view the authorities, it would not be proper, in any event, to permit proof that defendant in fact committed the crime of sodomy, conceding that it was proper to admit proof that the deceased had commenced, or threatened to commence, criminal proceedings against defendant for such offense. See *Williams v. State*, 69 Ga. 11; *Martin v. Com.*, 93 Ky. 189, 19 S. W. 580; *Cotton v. State* (Miss.) 17 South. 372. For a correct statement of the general rule regarding proof of collateral crimes, together with the exceptions thereto, see 12 Cyc. 405-412, and numerous cases cited. We are of the opinion therefore that it was prejudicial error to admit this testimony.

The next assignment of error argued by appellant's counsel calls in question the correctness of the following instruction: "I instruct you, further, that, if any statements of the defendant made out of court have been proved in this case, you may take them into consideration with all the other facts and circumstances proved. What the proof may show, if anything, that the defendant has said against himself, you have the right to assume to be true because against himself; but anything you may believe from the evidence that the defendant has said in his own behalf you may treat as true or false, just as you believe it true or false, when considered with a view to all the other facts and circumstances in the case." Counsel contend that there is no legal implication that a statement against interest is true, and that the giving of said instruction was an unwarranted invasion of the province of the jury. In this we think counsel are in error. We understand the rule to be that admissions and declarations made against interest are admissible because of the strong probability of the truth thereof. The jury were not told that they should treat such statements as true, but simply that they had the right to assume that they were true. We think there is a natural presumption of the truth of such statements, in the absence of any proof to the contrary. The in-

struction would, no doubt, be in better form if qualified so as to read: "In the absence of any proof to the contrary, the jury may accept as true any statements made against interest," etc. But we think the instruction as given would be understood by the jury the same as if it was thus qualified. The instruction was apparently taken from 2 Blashfield on Instructions to Juries, section 886. A similar instruction was approved in *State v. Darrah*, 152 Mo. 522, 54 S. W. 226.

It is next contended that the giving of the following instruction constituted error: "It is not enough that the party killing another believed himself in danger from the persons killed, unless the facts were such that the jury, in the light of all the facts and circumstances known to the slayer, or believed by him to be true, can say he had reasonable ground for such belief." We think the above instruction, when considered in the light of the other instructions given upon the subject of justifiable homicide, was correct. Appellant's counsel evidently construe said instruction as stating, in effect, that the reasonable ground for belief of danger must be such as would be entertained by a reasonably cautious person under like circumstances; but we do not so construe it. The jury were, in effect, instructed that they must determine the question of the reasonableness of defendant's belief from his standpoint, viewed in the light of all the facts and circumstances known to him or believed by him to be true. We fully agree with appellant's counsel that defendant's conduct is not to be judged by what a reasonably cautious person might or might not do or consider necessary to do under like circumstances, but what he himself in good faith honestly believed and had reasonable ground to believe was necessary for him to do to protect himself from apprehended death or great bodily injury. While there is a diversity of judicial opinion upon the question, we think the better rule is that the circumstances bearing upon the reasonableness of defendant's belief must be viewed from the standpoint of defendant alone, and that he will be justified or excused if such circumstances were sufficient to induce in him an honest and reasonable belief that he was in danger. Defendant's belief of danger must be based upon reasonable grounds, as stated in the instruction; but, as before stated, the authorities are divided as to the method of determining the existence or nonexistence of such grounds. In some states the rule is that where a man acts upon appearances he

does so at his peril; the test of reasonableness being that the circumstances surrounding him at the time of the homicide must have been such as would induce a reasonably cautious man to believe that he was in imminent peril, and that it was necessary for him to kill his assailant in order to protect himself from death or great bodily harm, while the rule in other states is that the circumstances must be viewed from the standpoint of defendant alone, and that he will be justified or excused if such circumstances were sufficient to create in his mind an honest and reasonable belief that he was in such imminent danger. The question being an open one in this jurisdiction, we have decided to adopt the latter rule as the more just; but, as before stated, we do not think the instruction excepted to conflicts with the rule as here adopted. Mr. Freeman has contributed a very able note upon this question in 74 Am. St. Rep. 717-726, in which, the authorities are collated. See, also, 21 Cyc. 815-819, and Wharton on Homicide (3d Ed.) section 284 et seq.

Appellant also assigns error upon the giving of the following instruction to the jury: "The court instructs the jury that a provocation cannot be considered for the purpose of reducing from a higher to a lower degree of homicide, unless the provocation was so recent that the homicide was committed in a 'transport of passion' occasioned by the provocation. If between the provocation and the homicide there is sufficient time for the blood to cool, and for the passion to subside, and reason to interpose, the provocation however great, cannot be considered. And the court instructs you that the reasonable time within which the law presumes that the blood has cooled, and the angry passions aroused by the provocation have subsided, is the time within which an ordinarily reasonable man would have cooled under like circumstances. In applying this test, all the circumstances attending the homicide are to be taken into consideration, including the nature and extent of the provocation, if any, the physical and mental condition of the defendant, his condition in life, and particular situation at the time of the homicide. In a word, all the pertinent circumstances may be considered, and the time in which an ordinary man in like circumstances would have cooled is the reasonable time." It is contended that the giving of the foregoing instruction was erroneous for two reasons: First, the jury were told that provocation could not be considered, either to excuse, justify or mitigate the offense, un-

less the provocation was so recent that the homicide was committed in a "transport of passion" occasioned by that provocation. It is said that to mitigate the offense to manslaughter it would be only necessary to show such a condition of excitement or passion as that the jury could see that in his condition the defendant could not have committed the homicide with deliberate malice, and with a premeditated design to kill. Second, it is contended that the instruction was erroneous for the reason that it told the jury that in determining whether the offense was murder, or some lesser crime, as depending upon whether the homicide was committed in a passion or in cool blood, that the time within which the defendant was presumed to have cooled, should the jury find that there had been provocation, was the time in which an ordinary man in like circumstances would have cooled. We think both grounds of objection to the instruction are sound. Where the evidence shows that a homicide was committed, in the heat of passion and with provocation, we think the jury, in determining whether there was sufficient cooling time for the passion to subside and reason to resume its sway, should be governed, not by the standard of an ideal, reasonable man, but they should determine such question from the standpoint of the defendant in the light of all the facts and circumstances disclosed by the evidence. We think the correct rule is stated by Mr. Wharton, in his work on Criminal Law (vol. 1, section 480 [8th Ed.]), as follows: "Whether there has been cooling time is eminently a question varying with the particular case, and with the temperament of the party. There are some provocations, which, with persons of even temperament, lose their power in a few moments; while there are others which rankle in the breast for days and even weeks, producing temporary insanity. Men's temperaments also vary greatly as to the duration of provocation, and it must be remembered that we must determine the question of malice in each case, not by the standard of an ideal, 'reasonable man,' but by that of the party to whom malice is imputed. A man may be chargeable with negligence in not duly weighing circumstances by which his passion would have been aroused, or, when aroused, would have been speedily abated. But he is not chargeable with malice when he was acting wildly and without malice, in hot blood. Hence, whether there has been cooling time, so as to impute to defendant malice, is to be decided, not by an absolute rule, but by the conditions of each case"

—citing numerous authorities. The above language is quoted with approval in *State v. Grugin*, 147 Mo. 39, 47 S. W. 1058, 42 L. R. A. 774, 71 Am. St. Rep. 553. We are aware that some courts have held to the contrary, but we are convinced that the rule as above announced is the more reasonable and just one. See Wharton on Homicide (3d. Ed.) section 208, and cases cited.

The next two assignments of error relate to rulings of the trial court in overruling defendant's objections to certain questions propounded to the witness Foaman by respondent's counsel, and in refusing to strike out the answers given to such questions. The questions and answers are as follows: "Q. Did Mr. Hazlett say anything to you at any time before you went into the butcher shop about the business to be conducted in it? A. He said I could run a saloon in it if I wanted to. Q. What kind of a pig, if he said anything about it? A. I don't know whether he said anything about blind pig; he said pig." We are unable to perceive how or in what manner this testimony tended to throw any light upon the issues involved. Whether the deceased was rightfully or wrongfully upon the premises where the homicide occurred was immaterial, and hence the terms or conditions of the lease between Foaman and the defendant were of no consequence, as the same could have no possible bearing upon the question as to whether the shooting was accidental or justifiable. The business relations existing between this witness and the defendant regarding the premises where the homicide occurred in no manner shed any light upon the question of defendant's guilt or innocence. We think therefore that the objection should have been sustained, and the motion to strike out such testimony granted. Whether these rulings constituted prejudicial error it is unnecessary for us to determine upon this appeal. The errors will, no doubt, be corrected upon the next trial.

Counsel for appellant next complain of certain rulings of the court based upon objections interposed by them to questions propounded to defendant on cross-examination relating to domestic troubles between the defendant and his wife. We are clear that these objections should have been sustained. The testimony in no manner tended to throw any light upon the issues involved, and it may have had a tendency to prejudice the minds of the jury. What we have said regarding the last assignment of error equally applies to assignments numbered from 46 to 67, both inclusive.

This testimony was all irrelevant and immaterial, and the objections thereto should have been sustained.

The next and last assignment of error is predicated upon the ruling of the trial court in permitting a certain question to be propounded to Mrs. Van Buskirk, and in refusing to strike out the answer to such question. The witness was asked to narrate a statement made by the deceased to her, which was clearly hearsay. This witness was also permitted to testify as to certain conduct of the deceased in attempting to borrow a gun for the purpose of meeting the defendant at a certain time in 1905. This testimony was wholly inadmissible, and the objection thereto should have been sustained.

The judgment is reversed, and a new trial ordered.

MORGAN, C. J., concurs.

SPALDING, J. (dissenting in part). I concur in the reversal of the judgment of conviction in this case, and while I agree with my associates that the instruction in the following language: "It is not enough that the party killing another believed himself in danger from the person killed, unless the facts were such that the jury in the light of all the facts and circumstances known to the slayer, or believed by him to be true, can say he had reasonable ground for such belief"—in the light of the circumstances of this case and the other instructions, is sustainable, yet, I cannot agree with the reasons given by my associates for sustaining it.

In my opinion, the other instruction complained of, wherein the trial court stated: "If between the provocation and the homicide there is sufficient time for the blood to cool and for passion to subside and reason to interpose, the provocation, however great, cannot be considered, and the court instructs you that the reasonable time within which the law presumes that the blood had cooled, and the angry passions aroused by the provocation have subsided, is the time within which an ordinary reasonable man would have cooled under like circumstances"—taken in connection with the rest of the charge on the subject, is the better rule of law. Its correctness is supported by the great weight of authority, and as I read the cases cited (*State v. Grugin*, 147 Mo. 39, 47 S. W. 1058, 42 L. R. A. 774, 71 Am. St. Rep. 533) it does not sustain the construction given it by my associates, and it is cited in several

textbooks as sustaining the doctrine announced in the portion of the charge above quoted. To hold that the only standard by which to judge of the sufficiency of the cooling time is that of the defendant, it seems to me, throws upon the injured party the burden of determining, before even entering into conversation with another, his mental condition, temperament, the ease with which he is provoked, and the time it will take for him to cool after provocation, and many other equally impractical and unreasonable duties. It is clear to me that the better rule is, not the time that it would take an ideal man or the defendant, but the time it would take the average or ordinary person, to cool under like circumstances. This principle has been approved by the vast majority of our courts that have passed upon it, and I think is the well-settled rule of law on this subject. I do not care to enter into a discussion on the subject, but call attention to *Ryan v. State*, 115 Wis. 488, 92 N. W. 271; 1 *McLain*, *Crim. Law*, sections 337, 338; 21 *Am. & Eng. Enc. Law*, 177, 178; *Wharton on Homicide* (3d Ed.), section 205 and cases cited.

(113 N. W. 374.)

BLANCHE HIGGS, ADMINISTRATRIX WITH THE WILL ANNEXED OF
THE ESTATE OF J. W. HIGGS, DECEASED, v. MINNEAPOLIS, ST.
PAUL & SAULT STE. MARIE RAILWAY COMPANY, A CORPORATION.

Opinion filed January 8, 1908.

Trial — Directing Verdict — Conflicting Evidence.

1. It is not error to deny a motion for a directed verdict or for a judgment notwithstanding the verdict, when the evidence shows a conflict as to whether the cause of action pleaded has been proven.

Evidence — Photographs.

2. Photographs, duly verified, are admissible in evidence as aids to the jury in arriving at an understanding of the evidence or of the situation or condition or location of objects or premises, material and relevant to the issues.

Same — Weight.

3. The weight to be given to such photographs by the jury is not of conclusive effect as a matter of law, but depends upon the skill, accuracy and manner in which taken, and they are to be considered under the same tests as other evidence.

Appeal from District Court, Dickey county; *Allen, J.*

Action by Blanche Higgs, administratrix of J. W. Higgs, against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Judgment for plaintiff and defendant appeals.

Affirmed.

Geo. T. Webb and *Alfred H. Bright*, for appellant.

Probative force will be denied to testimony that is plainly at war with physical facts and surroundings. *Payne v. R. R. Co.*, 38 S. W. 308; *So. Railway v. Smith*, 30 C. C. A. 58; *Howe v. Ry. Co.*, 64 N. W. 102; *Medcalf v. St. P. Ry. Co.*, 84 N. W. 633; *Cawley v. Ry. Co.*, 77 N. W. 179; *Stafford v. Chippewa Valley Ry. Co.*, 85 N. W. 1036; *Badger v. Janesville Cotton Mills*, 70 N. W. 687; *Thompson v. Pioneer Press Co.*, 33 N. W. 856; *Groth v. Thomann*, 86 N. W. 178.

W. S. Lauder and *Austin & Axtell*, for respondent.

A motion for a non-suit must state precisely the ground relied on. *Hayne on New Trial*, section 116; *Tanderup v. Hansen*, 66 N. W. 1073; *Longley v. Daly*, 46 N. W. 247; *Howie v. Bratrud*, 86 N. W. 747; *Minnesota Thresher Co. v. Lincoln*, 4 N. D. 61, 61 N. W. 145.

Motion to direct a verdict must point out precisely wherein evidence is insufficient. *People v. Banvard*, 27 Cal. 470; *Sanche v. Neary*, 41 Cal. 485; *Kiler v. Kimball*, 10 Cal. 267; *McGarrity v. Byington*, 12 Cal. 426.

To support a directed verdict the testimony must be undisputed and be given the most favorable construction that it will bear, and have in its favor all reasonable inferences arising from it. *Merchants National Bank v. Stebbins*, 89 N. W. 674; *Bohl v. Dell Rapids*, 91 N. W. 315.

A railway company must keep its right of way reasonably clear of combustible material. *Wood Railway Law*, 1350, 1362; *Pierce on Railroads*, 434; *Siblrud v. Minneapolis & St. Louis Ry. Co.*, 29 Minn. 58; *Woodson v. Milwaukee & St. Paul Ry. Co.*, 21 Minn. 60; *Gibbons v. Wisconsin Val. Ry. Co.*, 17 N. W. 132; *Jones v. Mich. Cent. R. Co.*, 26 N. W. 662; *Gibbons v. Wis. Va. R. Co.*, 28 N. W. 170; *White v. M. Pac. Ry. Co.*, 1 Pac. 611; *Field v. N. Y. Cen. Ry. Co.*, 32 N. Y. 339; *Eddy v. Lafayette*, 163 U. S.

456, 16 L. Ed. 1082; *Clarke v. C., St. P. M. & O. Ry. Co.*, 33 Minn. 359; *Lake Erie, etc., Ry. Co. v. Clark*, 62 Am. St. Rep. 772; *Hoffman v. King*, 73 Am. St. Rep. 715; section 4304, Rev. Codes 1905.

MORGAN, C. J. This is an action for damages for the destruction of hay and grass by a prairie fire, alleged to have been caused by the defendant's negligence. The defendant's negligence as alleged in the complaint is based upon: (1) Negligently permitting dry and combustible grass and weeds to accumulate and remain upon its right of way. (2) Negligence in the construction of the engine, by reason of which sparks emitted therefrom, which caused the destruction of the property and the consequent damages. (3) Negligent operation of the engine by the defendant's employees. The answer was a general denial. The jury found for the plaintiff, and assessed damages at the sum of \$1,753.05. Motions for a new trial and for judgment notwithstanding the verdict were denied. Defendant has appealed from the judgment entered on the verdict.

There is only one assignment of error, and that is that the trial court erred in refusing to direct a verdict for the defendant at the close of the taking of the testimony. The ground on which a reversal of the judgment is claimed is that the testimony conclusively shows that the fire which destroyed the plaintiff's hay did not originate on the defendant's right of way, and therefore the allegation of the complaint that the defendant was negligent in permitting dry and combustible material to remain on its right of way was not sustained, and that the condition of the right of way became, for that reason, immaterial. Plaintiff's evidence, given by several witnesses, was specific that the fire started on the right of way and as to the place on the right of way where the fire started, and where it left the right of way and reached plaintiff's property some distance away. Some of these witnesses were at the scene of the fire very soon after it started, and testified that it started on the right of way a very few feet from the railroad track. The defendant's witnesses testified, after an examination of the course taken by the fire, that it did not start on the right of way. The defendant, however, contends that the plaintiff's witnesses, who testified that the fire originated on the right of way, are all mistaken, or testified falsely, willfully, and relies as conclusive proof of this fact on photographs taken of the right of way at the point where

it is claimed by the plaintiff that the fire originated. These photographs were taken on April 2, 1904, and the fire occurred on November 15, 1903. They were identified by the photographer who took them as accurate photographs of the right of way at the place where it is claimed the fire originated and of the right of way extending each way from that point for a long distance. It is claimed that these photographs show that there was no burned ground at the place where it is claimed by the plaintiff that the fire originated, or at any place near there, and on the contrary that the right of way at these places is covered with grass. The photographs do show some burned ground under the fence at the limit of the right of way, but this is explained by defendant's witnesses as having been burned by the fire burning back. From this evidence we are asked to give conclusive effect to the evidence as indicated by the photographs, and to hold that there was no conflict in the evidence. Upon a review of the evidence we are positive in our conclusion that there is a material conflict in the evidence as to whether the fire originated on the right of way or not, and that it was the province of the jury to determine what the truth was, and that it was not error to submit this question to the jury.

We are asked to disregard all the plaintiff's evidence, as given by his witnesses, as "contrary to reason." The basis of this contention is that the photographs show physical facts of such a character and in such a manner that to give belief to the witnesses' testimony as given on behalf of plaintiff is to believe witnesses testifying to a physical impossibility. In other words the photographs are relied on as unimpeachable evidence. We do not agree with this contention. Photographs when verified as true pictures of a person or place to the satisfaction of the trial judge, are competent evidence to aid the jury in better understanding the situation than it could if the condition of the person or place were described by oral testimony of witnesses. *Am. & Eng. Enc. Law*, vol. 22, p. 774, and cases cited; *Wigmore on Ev.*, section 790, and cases cited; *Elliott on Evidence*, vol. 2, section 1263. They stand, so far as their credibility as evidence is concerned, upon the same basis as maps or diagrams do. Their correctness is not irrefutable. In each case their correctness depends on the reliability, accuracy and skill of the person making the diagram, or taking and developing the photograph. The correctness of a photograph is not wholly dependent on the action or effect of the light. That effect is not

in all cases recorded with like results, and these results depend upon the efficacy of the camera, and the efficiency of the operator. He may be an expert, or an unskilled amateur. It cannot be disputed that the photograph rests upon human testimony as to its correctness, and when unverified carries no conviction as to its correctness. An eminent writer has said on this subject: "It is sufficient to note at this point that by universal judicial concession a map, model, diagram or photograph takes an evidential place only as a nonverbal mode of expressing a witness' testimony." Wigmore on Evidence, section 790. "It is true that a photograph can be deliberately so taken as to convey the most false impression of the object." Wigmore, section 792. In *L. E. & W. R. R. Co. v. Wilson*, 189 Ill. 89, 59 N. E. 573, it was said: "The general rule is that photographs stand on the same footing as a diagram, map, plan or model, and that a photograph is a legitimate mode of proving a condition which can be shown by a representation of that sort. It rests to some extent upon the credit of witnesses in the same way as a map, plat or plan." In *Beardslee v. Columbia Twp.*, 188 Pa. 496, 41 Atl. 617, 68 Am. St. Rep. 883, the court said: "Photographs are competent evidence, and when properly taken are judicially recognized as of a high order of accuracy. * * *

But, in careless or inexperienced or interested hands, they are capable of very serious misrepresentation of the original." In *Stewart v. St. P. City Ry. Co.*, 78 Minn. 110, 80 N. W. 855, it was said, in speaking of photographs as evidence: "But their value depends upon their accuracy. They must be shown by extrinsic evidence to be faithful representations of the place or subject as it existed at the time involved in the controversy." In *Bruce v. Beal*, 99 Tenn. 303, 41 S. W. 445, the court said: "It is not to be understood, however, that every photograph taken by the cathode or X-ray process would be admissible. Its competency, to be first determined by the trial judge, depends upon the science, skill, experience and intelligence of the party taking the picture and testifying with regard to it, and that, lacking these important qualifications, it should not be admitted. And again, that, even when properly admitted, it is not conclusive upon the triers, but is to be weighed like other competent evidence." It seems to be well established that the weight to be given to a photograph as evidence depends upon the manner and circumstances under which it is taken and the skill of the artist and the perfection of the instrument with which it

is taken. In no case have we found that it has been given the great and conclusive weight asked for it by the appellant, and from the nature of things it should not be given such weight; but its weight should be left to the jury to be determined under the same tests that all other evidence is weighed. The fact that the photograph was taken several months after the fire should not detract from its weight, providing the premises were in the same condition as they were in at the time of the fire, or, if not in the same condition, that the changes were duly explained.

Considered in connection with the photographs or without them, there was a substantial conflict in the evidence as to where the fire started, and it was not error to deny the motion for a directed verdict. Upon the same grounds it was not error to overrule the motion for a new trial and the motion for judgment notwithstanding the verdict. The verdict must be sustained therefore, as there was sufficient evidence of defendant's negligence in permitting dry grass and other combustible materials on its right of way and that the fire originated on the right of way and caused plaintiff's loss. It is not necessary to determine whether the evidence shows that the engine was negligently constructed, or was out of repair, or negligently operated, in view of the fact that the judgment appealed from must be necessarily affirmed on the ground stated.

Affirmed. All concur.

(114 N. W. 722.)

NOTE: As to use of photographs as evidence. See *Dedrich v. Salt Lake City R. Co.*, 35 L. R. A. 802.

As to judgments notwithstanding the verdict see note to *B. & R. Lumber Co. v. Coe Com. Co.*, 13 N. D. 648, 102 N. W. 880. A judgment notwithstanding the verdict will not be upheld on account of variance between cause of action stated and proof adduced; it must further appear that no amendment of complaint is possible. *Welch v. N. P. Ry. Co.*, 14 N. D. 19, 103 N. W. 396. Also that there is no reasonable probability that the defects in proof and pleading can be remedied on a new trial. *Houghton Implement Co. v. Vavrosky*, 15 N. D. 308, 109 N. W. 1024.

A. H. GRADY v. CON SCHWEINLER.

Opinion filed Nov. 13, 1907.

Bailment — Contract and Statutory Liability.

1. A contract of hire between bailor and bailee that the bailee will return a stallion in as good condition as when received or pay for it creates a liability on the bailee greater than that imposed by law in the absence of a special contract—that of ordinary care.

Same.

2. Under such a contract, the bailee is liable for the value of a stallion that died of disease while in the bailee's possession, although without fault on his part.

Same.

3. Under such a contract, the bailee becomes an insurer for the return of the stallion.

Same — Action on Contract — Pleading.

4. A complaint states a cause of action in such a case when it pleads the contract and a refusal to perform it after due demand, without any allegation of negligence.

Appeal from District Court, Barnes county; *Winchester*, Special Judge.

Action by A. H. Grady against Con Schweinler. Judgment for defendant, and plaintiff appeals.

Reversed and remanded.

Lee Combs, for appellant.

A bailee may enlarge his legal responsibility by contract, express or implied. *Butler v. Green*, 68 N. W. 496; *Lance v. Griner*, 53 Pa. St. 204; *Sturm v. Baker*, 150 U. S. 329, 14 L. Ed. 99; *Rohrabacher v. Ware*, 37 Iowa, 85; *Harris v. Howard*, 56 Vt. 695; *Reinstein v. Watts*, 84 Me. 139; *Austin v. Miller*, 74 N. C. 274; *Van Tall v. Southeastern R. Co.*, 12 C. B. N. S. 75; *Walker v. York, etc., R. Co.*, 2 C. L. R. 237; *Sweitzer et al. v. Pinconing Lumber Co.*, 26 N. W. 762; *Vanwormer v. Crane*, 16 N. W. 686; *Harvey v. Murray*, 136 Mass. 377; *Drake v. White*, 117 Mass. 10; *Stevens v. Webb*, 7 C. & P. 60; *State v. Worthington* 7 Ohio 171.

Where plaintiff proves the contract of bailment, delivery of chattel to bailee in good condition, and its destruction, a *prima facie*

case is made, and defendant must rebut the presumption of negligence and has burden of proof. *Marshall v. Andrew & Gage*, 8 N. D. 364, 79 N. W. 851; *Sulpho-Saline Bath Co. v. Allen*, 92 N. W. 354; *Cummins et al. v. Wood*, 92 Am. Dec. 189; *Donlon v. Clark*, 45 Pac. 1; *Sheldon v. Robinson*, 26 Am. Dec. 726; *Ouderkirk v. Bank*, 23 N. E. 875; *Davis v. Tribune Co.*, 72 N. W. 808, 5 Cyc. 217; *Burnell v. Railroad Co.*, 45 N. Y. 184; *Schwerin v. McKie*, 51 N. Y. 180; *Steers v. Steamship Co.*, 57 N. Y. 1; *Claflin v. Meyer*, 75 N. Y. 260.

Herman Winterer and D. S. Ritchie, for respondent.

The chattel being delivered without transfer of title the contract was primarily one of bailment. *Scott Mining and Smelting Co. v. Schultz & Clary*, 73 Pac. 903; *Porter v. Duncan*, 23 Pa. Super. Ct. 58; *State v. Sienkiewicz*, 55 Atl. 346; *Bates v. Bigby*, 51 S. E. 717.

The bailee is not an insurer. *Fairmont Coal Co. v. Jones & Adams Co.*, 134 Fed. 711; *Knights et al. v. Piella*, 69 N. W. 92; *Seevers v. Gabel*, 62 N. W. 669; *St. Paul & Sioux City R. R. Co. v. Minneapolis & St. Louis Ry. Co.*, 26 Minn. 243; *World's Columbian Exposition v. Republic of France*, 91 Fed. Rep. 64; *Lake Mich. Car Ferry Transportation Co. v. Crossby*, 107 Fed. 723; *Drudge v. Leeter*, 63 Am. St. Rep. 359; *Shropshire v. Sidebottom*, 30 Mont. 406, 76 Pac. 941; *Adams v. New Jersey Steamboat Co.*, 56 Am. St. Rep. 616; *Dinsmore v. Abbott*, 89 Me. 373.

Plaintiff having let his horse for a specific purpose assumes risks incident thereto, except what is due to the negligence or fault of bailee. *Leach v. French*, 31 Am. Rep. 296; *Buis v. Cook*, 60 Mo. 391; *Carrier v. Dorrruance*, 19 S. C. 30; *Algon v. Grande Ronde Lumber Co.*, 81 Pac. 385; *Sanderson v. Collins*, 73 Law J. K. B. 358; *Daily v. Black*, 92 Mo. App. 228.

Burden of proof of negligence against bailee for hire is upon plaintiff. Story on Bailments, sections 213 and 410; Schouler on Bailments and Carriers, section 23; *Schmidt v. Blood*, 24 Am. Dec. 143; *Foot v. Stoors*, 2 Barb. 326; *Harrington v. Schneider*, 3 Barb. 380; *Malaney v. Taft*, 15 Atl. 326; *Bissell v. Harrison Co.*, 95 N. W. 779; *Wisecarver v. Long & Camp*, 94 N. W. 467; *James v. Orrell*, 57 S. W. 931; *Knights et al. v. Piella*, 69 N. W. 92; *Standard Brewery v. Hales & Curtis Malting Co.*, 70 Ill. App. 363; *Stacy v. Knickerbocker Ice Co.*, 54 N. W. 1091; *Dinsmore v. Abbott*, 89

Me. 373; *Higman v. Carmody*, 57 Am. St. Rep. 33; *Cook v. National Express Co.*, 1 Lack. Leg. N. 289.

Where a horse, without the fault of the hirer, dies, the loss and expense fall upon the owner. *Leech v. French*, 31 Am. Rep. 296; *Buis v. Cook*, 60 Mo. 391; *Malaney v. Taft*, *supra*; *State v. Burke*, 14 Am. Rep. 60; *Britton v. Aymar*, 23 La. Ann. 63; *McEvers v. Sangamon*, 22 Mo. 187; *Haralson v. Hahl*, 85 S. W. 1008; *Alden v. Grande Ronde Lbr. Co.*, *supra*; *Vroman v. Kryn*, 86 N. Y. S. 94; *Wisecarver v. Long & Camp*, *supra*; *Daily v. Black*, 92 Mo. App. 228; *Pussey v. Webb*, 47 Atl. 701.

MORGAN, C. J. Plaintiff brings an action for damages against the defendant for the value of a stallion delivered by him to the defendant on a contract of bailment. The stallion was delivered to the defendant for serving his mares for the agreed sum of \$5 a foal. The complaint alleges plaintiff's ownership of the stallion, the value thereof, his delivery to the defendant under an express contract that defendant would return him to the plaintiff, and, in case that he should be unable to return him, then defendant would pay plaintiff the value of said stallion, and that plaintiff demanded his return to him or payment of the value thereof, which was refused by the defendant. Judgment is demanded for the sum of \$400. The answer admits that said stallion was delivered to the defendant for the purposes alleged in the complaint, but denies that he agreed to pay for said stallion in case of his inability to return him upon demand. The answer further alleges that the stallion was sick when delivered to defendant, and that plaintiff knew of such sickness, and, that in consequence of such sickness, the stallion died soon after his delivery to defendant, without any fault or negligence on his part. A jury was impaneled, and, at the close of plaintiff's case, the trial court directed a verdict for the defendant, and judgment was thereafter entered on the verdict, and plaintiff has appealed from said judgment.

The only assignments of error relate to the action of the court in directing a verdict for the defendant. These assignments render it necessary to determine the plaintiff's rights under the contract as set forth in plaintiff's evidence. The motion for a directed verdict was based upon the alleged grounds that the evidence shows that the stallion died before the contract of hire under which he was turned over to defendant had terminated, without any fault or

negligence on defendant's part, and that the contract of hire was not binding on defendant for the reason that a return of the stallion became impossible by reason of his death without any fault on defendant's part. The question is squarely presented whether plaintiff can recover under the facts, independent of any question of negligence or fault on defendant's part. The complaint contains no allegation of fault or negligence as a basis for recovery, but is framed upon the theory of liability on a contract of hiring, and in addition, of insurance, if the horse was not returned. Plaintiff's evidence was as follows, which must be assumed to be true for the purposes of this appeal. Plaintiff testified: "He said: 'I will take the horse and return him in as good or better shape than I got him, and, if I don't, I will pay for him. I am good for him.' I agreed to let him have the horse to breed his mares at \$5 a colt, provided he returned the horse as he got him, and, if he didn't, he should pay for him. Mr. Schweinler said he would take him on those terms, and if he didn't return him as good as he got him, he would pay for him." A witness for plaintiff testified: "Mr. Schweinler said he would fetch the horse back in as good condition as he took him, or, if anything happened, he would pay for him." The appellant's contention is that the relative rights of the plaintiff and defendant, as bailor and bailee, must be determined from the contract of bailment, and not by the general rules of liability under the law of bailments. We have no doubt of the correctness of this contention. Parties are permitted to make their own contracts in reference to their mutual rights and liabilities under bailments of property as well as in reference to other subjects, but, of course, are not permitted to contract in contravention of positive law or public policy, and perhaps may not in all cases relieve themselves from the results of their own negligence. In this case the language was positive and unequivocal that the bailee was to pay for the horse if he was unable to return him for any reason. If anything happened to the horse, making a return impossible, payment was to be made. This language permits of no exceptions, but implies an unconditional liability if the horse could not be returned. It does not permit of the meaning that the horse was to be paid for only in case of its loss through the bailee's fault or negligence. It creates the bailee an insurer of the return of the horse when the purposes of the bailment have been accomplished and a return demanded. The authorities firmly indorse this principle.

As stated by Shouler in his work on Bailments, section 106: "Whatever lawful terms may have been introduced by their contract for the purpose of qualifying the method or risk of performance should be given full force, whether expressly set forth or only implied." In *Steele v. Buck*, 61 Ill. 343, 14 Am. Rep. 60, the court said: "The principle that lies at the foundation of the series of authorities, English and American, on this question, is that the party must perform his contract, and, if loss occurs by inevitable accident, the law will let it rest upon the party who has contracted that he will bear it." In that same case the following was cited with approval: "Where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his own contract. If a party entered into an absolute contract, without any qualifications or specifications, and receives from the party with whom he contracts the consideration for such engagement, he must abide by the contract. and either do the act or pay damages, if liability arises from his own direct and positive undertaking." In *Drake v. White*, 117 Mass. 12, the court said: "In the present case the parties have reduced their contract to writing and have omitted to attach to the defendant's liability for the property any limitation whatever. On the contrary, their express promise is to do one or the other of two things—either to return the property specifically, or to pay for it in money. There can be no doubt that if a creditor sees fit to accept a deposit of security upon such terms, and to place himself in the position of an insurer of its safety, he can legally do so. It is not difficult to suppose a case in which the party might find it convenient that the business of guarding against the risk of fire or other accident should be attended to by the depositary. But, however that may be, the proper interpretation of the contract is to be determined by the general rules of construction recognized by the law; and, if the parties have improvidently made their contract more onerous than they expected, the difficulty cannot be removed by a violation of these rules." In *Butler v. Greene*, 49 Neb. 280, 68 N. W. 496, the court said: "If the defendant contracted to keep the watch in the vault of the bank, and if it was lost by reason of his failure to do so, he was liable without regard to the general principles of the law of bailment. He had made a contract, and he was liable for all damages resulting from his failure

to perform it. If he had no right to keep the watch in the vault, that was his affair, and not the bailor's. The contract was not to keep the watch in the vault if the bank permitted it, but it was absolute; and it was the pledgee's business to see that he had authority to keep it there. If he had not, he should not have made the contract." See, also, Hale on Bailments & Carriers, p. 28, and cases cited; *Lance v. Griner*, 53 Pa. 204; 5 Cyc. p. 185, and cases cited; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; *Harvey v. Murray*, 136 Mass. 377; *Rohrabacher v. Ware*, 37 Iowa, 85; *Standard Brewery v. Malting Co.*, 171 Ill. 602, 49 N. E. 507; *Fairmont Coal Co. v. Jones & Adams Co.*, 134 Fed. 711, 67 C. C. A. 265; *Reinstein v. Watts*, 84 Me. 139, 24 Atl. 719; *Austin v. Miller*, 74 N. C. 274.

Respondent contends that the contract imposes only such liability as the law would impose without it. Without any special contract, the law would impose on the defendant the duty to use ordinary care, and, in case of the death of the animal without defendant's fault, he would not be responsible. In this case, as we have shown, the contract went further, and enlarged the obligations of the bailee in respect to those devolving on him where no special contract exists. The principle contended for, therefore, has no application. The fact that the horse died while in defendant's possession without his fault, is not a defense in view of the existing contract shown by the evidence and presumed to be true for the purposes of this appeal. The plaintiff having alleged and proved the contract, a breach thereof, demand, and a refusal to comply therewith, stated a cause of action in the complaint, and the same was established by the evidence without any showing of negligence.

The judgment is reversed, a new trial granted, and the cause remanded for a new trial. All concur.

(113 N. W. 1031.)

THE STATE OF NORTH DAKOTA, EX REL DON McDONALD, v. H. L. HOLMES, AUDITOR OF THE STATE OF NORTH DAKOTA.

Opinion filed Jan. 8, 1908.

Supreme Court — Original Jurisdiction — Prerogative Writ.

1. The supreme court's jurisdiction under the constitution to issue original writs (except those writs necessary to the proper exercise

of its appellate jurisdiction and to aid in its supervisory control over inferior courts) extends only to prerogative writs, viz., in cases publici juris, wherein are directly involved the sovereignty of the state, its franchises or prerogatives, or the liberty of the citizen.

Same — Discretion of Court.

2. Whether the court will exercise its extraordinary jurisdiction in cases coming within the above rule is a matter within its sound judicial discretion, depending on the particular facts in each case; but, in cases not within said rule, no discretion is vested in this court.

Same.

3. Applying the above well-established rules, it is held that the relator, who is county treasurer of Grand Forks county, is not entitled to invoke the jurisdiction of this court to issue the writ of mandamus to compel the state auditor to issue and deliver to the state treasurer a warrant pursuant to the provisions of chapter 139, p. 185, Laws 1903, being section 9395, Rev. Codes 1905.

Application by Don McDonald, county treasurer, for writ of mandamus against H. L. Holmes, state auditor.

Writ denied.

J. B. Wineman, State's Attorney, for relator.

T. F. McCue, Attorney General, for respondent.

FISK, J. Upon the application of the relator herein, supported by affidavit, an alternative writ of mandamus was issued by this court, directed to the defendant as State Auditor, commanding him to issue and deliver, or show cause why he has not done so, a state warrant or warrants in the aggregate sum of \$100 to the state treasurer to be credited by the latter to the relator in his settlement with such treasurer, pursuant to the provisions of chapter 139, p. 185, Laws 1903, being section 9395, Rev. Codes 1905. This law provides for the payment of a reward of \$50 to each person who secures the arrest and conviction of any violator of the provisions of the chapter of the Penal Code prohibiting the unlawful sale of intoxicating liquors in this state. This law provides for the payment of such rewards by the county treasurer upon certificates issued by the state's attorney, and, upon making such payments, the county treasurer is required to take receipts therefor, and forward such certificates and receipts to the state auditor, whose duty it is to issue and deliver a state warrant or warrants

for a corresponding amount to the state treasurer, to be by him credited to such county treasurer in his settlement with him.

The defendant, through the attorney general of this state, made return to said alternative writ, in substance, as follows: (1) The defendant objects to this court taking jurisdiction of the subject-matter, for the reason that the action is prosecuted in the name of a private relator, who is not entitled to prosecute the same in the name of the state of North Dakota. (2) That said chapter 139, p. 185, Laws 1903, was repealed by chapter 187, p. 303, Laws 1907. (3) That chapter 139, p. 185, Laws 1903, aforesaid, is unconstitutional, in that it attempts to appropriate the public funds in violation of the constitution. (4) That no fund has been created by the legislative assembly out of which to pay such reward. To this return the relator has demurred upon the ground that the same fails to state facts sufficient to constitute a defense, and fails to show any cause for not obeying said writ. It will be noticed that the return does not put in issue the truth of any of the facts set forth in the relator's affidavit. Such return, therefore, amounts to a demurrer to the facts set forth in such affidavit, and these facts must be accepted as true for the purposes of these proceedings.

At the threshold of our inquiry, we are confronted with an important question of practice, which requires us to determine relator's right to invoke the original jurisdiction of this court to issue such writ. Counsel for relator contends that this court in *State ex rel. Moore v. Archibald*, 5 N. D. 359, 66 N. W. 234, settled this question of practice in relator's favor. In that case the relator, who had been appointed to the office of superintendent of the state hospital for the insane by the trustees of that institution, made application to this court in the name of the state for a writ of mandamus to compel the defendant to turn over to him the possession of such office, and, while it is true that the application was granted and the writ was issued as prayed for, it is also true that the court in the very exhaustive and learned opinion by Corliss, J., was careful to place the decision solely upon the ground that the exercise of its original jurisdiction, under the facts of that case, was necessary "to uphold the sovereignty of the state against a direct attack upon it in a matter of great public importance." We quote from the opinion as follows: "While the contest is nominally between two individuals claiming the office of the superintendent of

the state asylum, the real question involved is whether a state board—the board of trustees of the asylum—shall be allowed to exercise that portion of the sovereignty of the state vested in it by the statute giving the board the general management and control of this state institution, and the power to remove at any time the superintendent, and appoint a new superintendent in his place. Rev. Codes 1905, section 992. This institution received a large appropriation of state funds, and is placed by the legislature under the control of a board of trustees. It certainly concerns the sovereignty of the state, not remotely and in a trifling particular, but directly and in a very important sense, whether one citizen shall defy the sovereignty of the people, and, by retaining his office of superintendent after removal, usurp to that extent the control of a great and expensive state institution. This court does not give relief in this case out of any consideration for the private rights of the relator, but solely to uphold the sovereignty of the state against a direct attack upon it in a matter of great public importance.” It will be seen that the court in that case expressly found that the sovereignty of the state was not remotely, but directly, concerned in defendant’s attempt, after his removal, to usurp the rights and prerogatives pertaining to the office of superintendent of this important state institution. This court has repeatedly had occasion to pass upon the question here involved, and has uniformly held that a writ such as that prayed for in these proceedings will not issue out of this court in the exercise of its original jurisdiction, except as a prerogative writ. Before such writ will be issued (except in aid of the appellate jurisdiction of this court or in the exercise of its supervisory control over inferior courts) the facts must disclose “a case *publici juris* affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of its people,” and leave to file an application for such writ should ordinarily be made by the attorney general in the name of the state. Such was the rule announced in *State v. Nelson County*, 1 N. D. 88, 45 N. W. 33, 8 L. R. A. 283, 26 Am. St. Rep. 609, and the practice there established has been strictly adhered to ever since by this court. See *State v. Archibald*, *supra*; *Elevator Co. v. White*, 11 N. D. 534, 90 N. W. 12; *State v. Wilcox*, 11 N. D. 329, 91 N. W. 955; *State v. McLean County*, 11 N. D. 356, 92 N. W. 385; and *State v. Nohle* (N. D.) 112 N. W. 141.

Do the facts in this case justify this court, under the rule thus established, in entertaining relator's application? We think not. While it is true, as argued by relator's counsel, that the people of the entire state are specially interested in the enforcement of the law, we fail to see how the sovereignty of the state, its franchises and prerogatives, or the liberties of its people are directly concerned in these proceedings. The direct and immediate object sought to be accomplished by the writ prayed for is to enable the relator, who is treasurer of Grand Forks county, to obtain a credit of \$100 in his settlement with the state treasurer. Incidentally, no doubt, the relator's purpose and that of his counsel is to obtain an adjudication by this court of certain questions of interest to the whole state; but, no matter how desirable or laudable this purpose may be, we cannot assume the exercise of jurisdiction contrary to the intent of the framers of the constitution, and this, we clearly would do, under the prior decisions of this court above cited, should we issue the writ in this case. As we view the question, there is no discretion vested in this court to be exercised either in granting or refusing the writ, but it is a question involving our constitutional right to exercise such jurisdiction at all. But, even if we possessed a discretion, we know of no reason why relator should not be required to seek his redress in the usual forum rather than to invoke the extraordinary jurisdiction of this tribunal. The chief function of this court is the exercise of appellate jurisdiction, and we must not permit this function to be impaired by the exercise of jurisdiction in cases not contemplated by the framers of the constitution.

Entertaining these views, it would be improper for us to notice the merits of the case.

The alternative writ will be quashed. All concur.

(114 N. W. 367.)

GEORGE W. FERRIS AND JEMIMA FERRIS, PLAINTIFFS AND RESPONDENTS, v. ANTON JENSEN, DEFENDANT AND APPELLANT, AND WELLS & DICKEY COMPANY, A CORPORATION, AND H. N. TUCKER COMPANY, A CORPORATION.

Opinion filed Dec. 20, 1907.

Vendor and Purchaser — Equitable Mortgage — Accounting.

1. Plaintiffs, who are husband and wife, brought this action, claiming an equitable estate in certain real property under a contract for the purchase thereof entered into by the husband with one of the defendants, and also claiming a homestead right in 160 acres of the land, and prayed judgment giving them a right to redeem upon paying the amount due under the contract and certain other sums as security, for the payment of which the husband had assigned to one of the defendants the contract aforesaid. Evidence examined, and *held*, for reasons stated in the opinion, that the relief prayed for must be denied.

Homestead — Abandonment — Non-joinder of Wife in Assignment of Contract.

2. Plaintiffs occupied the land, and farmed the same for several years, but failed to comply with the contract in any material respect, and, having become helplessly in debt and unable to perform his part of the contract, the husband early in 1903 without his wife joining with him, negotiated a sale of his equity therein to defendant Jensen, and sold and disposed of all his personal property, and shortly thereafter yielded possession of the premises to Jensen, both plaintiffs voluntarily removing from the land. *Held*, following the rule announced in *Helgebye v. Dammen*, 13 N. D. 167, 100 N. W. 245, that such facts constituted an abandonment of the contract and of their homestead rights in the land.

Same — Forfeiture of Contract Extinguishes Homestead Right.

3. A wife's homestead rights in land of which her husband has merely an equitable title under an executory contract for the purchase thereof are no greater than, and are dependent upon, the rights of her husband under the contract. If the husband's equitable estate becomes forfeited or otherwise extinguished, the homestead right is also extinguished.

Account — Right of Action.

4. The trial court denied the relief asked for, but took an account between plaintiff, Geo. W. Ferris, and defendant, Jensen, and rendered a money judgment against said defendant and in said plaintiff's favor, basing such action upon the theory of a sale to said defendant of such equitable estate. Whether an accounting was proper under the issues is not determined; the evidence showing that no cause of action was proved, even under such theory.

Appeal from District Court, Foster county; *Burke, J.*

Action by George W. Ferris and Jemima Ferris against Anton Jensen. Judgment for plaintiffs, and defendant appeals.

Reversed.

W. O. Lowden and S. E. Ellsworth, for appellant.

Parks & Olsberg, for respondents.

FISK, J. This action is here for trial de novo of all the issues. The complaint substantially alleges: (1) That plaintiffs are husband and wife. (2) That on or about April 1, 1900, the plaintiff Geo. W. Ferris entered into a contract in writing with the defendant, Wells & Dickey Co., whereby said plaintiff agreed to purchase from said company, and the latter agreed to sell to him the real property in controversy, consisting of the S. $\frac{1}{2}$ of section 33, township 147, range 62, for the consideration of \$2,080, with interest at the rate of 8 per cent per annum, payable annually. Said purchase price was agreed to be paid by delivering to the vendor one-half of the crops raised on said land each year until fully paid, the plaintiff agreeing to crop certain portions of the land each season, and also to pay the taxes thereon for each year, including those for 1900. (3) Plaintiffs entered into possession of said land under such contract in April, 1900, and established their home upon the S. E. $\frac{1}{4}$, where they resided continuously until about September 1, 1903, making certain improvements thereon, and also upon the other quarter. (4) That in the month of October, 1902, Geo. W. Ferris, without the knowledge or consent of his wife, assigned said contract to H. N. Tucker Company as security for the payment of \$1,800, and that in November following the H. N. Tucker Company assigned said contract, together with the indebtedness secured thereby, to defendant Jensen. (5) Thereafter the Wells-Dickey Company executed and delivered to defendant Jensen a deed to the land aforesaid upon his paying to it the amount due under its said contract. (6) Then follows an allegation that defendant Jensen never demanded of plaintiff the payment of any sum under the contract, and that he refuses to allow plaintiff to redeem by paying the sum due thereunder or secured thereby, and claims to be the absolute owner of said property, and has kept the said premises and the rents and profits thereof since the commencement of the year 1903. (7) That plaintiff Jemima Ferris has

never assigned her homestead right in said land, and has never abandoned the same. (8) That plaintiff Ferris has never assigned or conveyed his interest in said land, other than his assignment of the contract to H. N. Tucker Company as security aforesaid, and that he never has abandoned his homestead interest therein; that he is and always has been ready and willing to pay to H. N. Tucker Company or its assigns the said sum of \$1,800 and interest, and to perform the terms of the contract entered into by him with the Wells-Dickey Company to be performed on his part, and that defendant Jensen refuses to permit him to do so.

The prayer for relief is: (1) That the deed from Wells & Dickey Co., to defendant Jensen be vacated and canceled of record. (2) That plaintiff Geo. W. Ferris be permitted to redeem by paying the amount secured by his assignment of said contract, to wit, \$1,800 and interest, and that he be restored to all his right, title and interest in the premises under his said contract with Wells-Dickey Company, and that plaintiffs be restored to their homestead rights therein. (3) That the court determine the amount due under said contract, and that plaintiffs be given a reasonable time in which to make payment thereof, and upon such payment the defendant Wells-Dickey Company be required to convey said property to plaintiffs; also for general relief.

Defendant Jensen answered separately, admitting the contract for the purchase of the land by Ferris from Wells-Dickey Company and that plaintiffs took possession of the land thereunder, and built a house thereon; but denies that plaintiffs have in any manner fulfilled the covenants therein to be performed by the plaintiff Geo. W. Ferris. He admits the assignments of the contract by Geo. W. Ferris to the Tucker Company and by the latter to himself, but alleges that the same were made with the knowledge and consent of Jemima Ferris; that the first-mentioned assignment was made to secure the sum of \$2,300, instead of \$1,800, as alleged in the complaint, and also that at the time the Tucker Company assigned the same to defendant it was agreed between him and the plaintiffs that such assignment should be held by defendant as security, not only for said sum of \$2,300, but also for the further sum of \$411.65, then owing by Geo. W. Ferris to defendant. Then follows an allegation that in January, 1903, plaintiff Geo. W. Ferris sold said land to defendant for the agreed consideration of \$1,500

and defendant, at said plaintiff's request, paid certain claims owing by him to various creditors, aggregating \$858.89, and also paid the balance due the Wells-Dickey Company under his contract with them, amounting to \$2,910, and, after deducting the \$4,500, agreed upon as the purchase price of said land from the total amount of such payments, including the sum due to defendant, there was an agreed balance still owing by said plaintiff to defendant of \$1,506, for which security on personal property was then given; that soon after the sale of said land to defendant, and on April 13, 1903, plaintiffs, in order to vacate and surrender possession thereof to defendant, had an auction sale of their personal property, and from and after that date and until their removal from said premises in August, 1903, they were mere tenants thereon of defendant; that in August plaintiffs voluntarily removed from said land, and established their home elsewhere, and have voluntarily waived and abandoned all claims thereto. Defendant admits that on January 27, 1903, he secured a deed to the premises from the Wells-Dickey Company, but alleges that the amount due said company and which was paid by him was \$2,910. He also denies that plaintiffs or either of them have any interest in said land, and denies generally all other allegations of the complaint not therein admitted. It is unnecessary to notice the answers of the other defendants as the action as to them was dismissed.

The issues thus framed were tried to the court without a jury, and the trial court made its findings of fact and conclusions of law, and rendered judgment in plaintiff's favor and against defendant Jensen for the sum of \$1,876.25, damages and interest thereon in the sum of \$328.34; also for \$34.80 costs and disbursements, making a total sum of \$2,239.39. The trial court found the main facts substantially as contended for by the defendant, except as follows: It found that the consideration agreed upon for the sale of the land to defendant was \$5,500 instead of \$4,500, the amount claimed by defendant. It also found that the total sum due the Wells-Dickey Company under its contract with Ferris for the sale of said land and the amount paid by defendant to said company was \$2,744.06, instead of \$2,910; further, that the total sum owing by Ferris to defendant on January 2, 1903, including claims of H. N. Tucker Company and assigned to him, was \$2,480.69. It further found that there was paid to and retained by defendant the proceeds of the auction sale of the personal property aggregating in

amount the sum of \$1,601.01, and, by striking a balance of account between the parties on the basis of the amounts of the debits and credits aforesaid, the sum of \$1,876.25 was arrived at. It will be observed by reading the complaint that the action was not brought for an accounting upon the theory of a sale of the land to defendant and a refusal on his part to pay or account for the purchase price thereof, and for the proceeds of the sale of the personal property, after deducting credits for indebtedness due defendant, nor was the same tried upon such theory. The plaintiffs contended, both in their pleading and testimony, that they never sold or abandoned their interest in the land, acquired under the contract with the Wells-Dickey Company. In view of the evidence, however, the trial court evidently considered it proper to grant relief to plaintiff in the form of a money judgment, as was done. We are not required to decide in this case whether under the pleadings and facts as found this practice was permissible, and we therefore express no opinion thereon. After a careful consideration of the testimony, we are of the opinion that plaintiffs' recovery cannot be sustained in whole or in part under any theory, and that appellant is entitled to a judgment dismissing the action. In giving our reasons for so holding we shall not attempt a complete analysis of the testimony as the same is very voluminous, occupying, as it does, nearly 300 printed pages of the abstract.

As we view the evidence, we have no hesitancy in finding that plaintiffs have become entirely divested of any and all right which they may have acquired in this property under the contract with the Wells-Dickey Company. The proof is clear and convincing that nothing was ever paid by plaintiffs toward the purchase price of said land, nor had plaintiffs complied therewith in any material respect, and while such defaults had not been taken advantage of by the Wells-Dickey Company, it is apparent that plaintiffs' rights under the contract were subject to forfeiture on account of such defaults at any time upon reasonable notice. It is also equally apparent from the testimony that plaintiff Geo. W. Ferris was hopelessly in debt and unable to carry out the provisions of the contract. Evidently realizing this fact in the early part of 1903, he concluded to sell his equity in the land, and also his personal property to satisfy such indebtedness, and to leave the country and abandon such contract, and pursuant to such intention he entered into negotiations with defendant, which culminated in a sale of his equity in the

land to defendant in March of that year. His personal property on said farm was incumbered to a large extent, and he arranged with defendant and other mortgagees thereof to sell the same at public auction, and apply the proceeds upon the indebtedness secured by the mortgages. This sale was held on April 13th, but only a portion of the chattels were sold, and, while there is some conflict as to the amount of the proceeds thereof turned over to defendant, we think the evidence warrants us in finding that the same was only \$409.20. It appears that thereafter, and on April 21st, the parties Geo. W. Ferris and defendant had an accounting and settlement of all matters between them, and it was found that the total indebtedness due from plaintiff to defendant, including the amount paid Wells-Dickey Company under the said contract, the amount of certain notes of plaintiff which defendant paid at plaintiff's request, and the amount of the claims assigned to defendant by H. N. Tucker Company, aggregated the sum of \$6,415.85, and, after crediting plaintiff with the purchase price of the land and the proceeds of the auction sale received by defendant, there remained an agreed balance of \$1,506.65 still due defendant, and the said plaintiff at that time gave to defendant a bill of sale of the remaining chattels, with the agreement that defendant should convert the same into cash, and apply the proceeds upon such balance. It also appears that thereafter defendant disposed of said property, and received and applied the proceeds, consisting of \$1,383, accordingly, leaving plaintiff still indebted to defendant. The proof also shows that defendant took possession of and cropped said land in the spring of 1903 with the knowledge, and tacit, if not the express, consent of plaintiffs, and it also appears that in the latter part of August or early in September following the plaintiffs voluntarily removed from said land, and have resided elsewhere ever since. It is true the plaintiff Jemima Ferris had a homestead right in said land to the extent of 160 acres, which had never been selected by either party as their homestead, and she did not join with her husband in the sale thereof to defendant, nor expressly consent thereto, but this homestead right, as was held by this court in *Helgebye v. Dammen*, 13 N. D. 167, 100 N. W. 245, was no greater than her husband's right under the contract. The existence of such homestead right was entirely dependent upon her husband's equitable title under said contract. Like a stream it could rise no higher than its source. The homestead

right ceased with the extinguishment of her husband's equitable estate in the land, and such equitable estate was extinguished by abandonment of the contract. Furthermore, we must hold under the evidence that both plaintiffs voluntarily abandoned their homestead rights when they removed from the land. The case at bar is very similar to the case of *Helgebye v. Dammen*, *supra*, upon the question of abandonment; and it is unnecessary to restate the rule there announced, or to cite the numerous authorities therein cited. Suffice it to say that after a careful consideration of the evidence, and in the light of the rules announced by this court in *Helgebye v. Dammen*, we feel constrained to hold that no cause of action was proved by either plaintiff upon the theory on which the action was brought, or upon the theory of an accounting adopted by the trial court, based upon the sale to defendant of the equity of plaintiff Geo. W. Ferris in the land.

Conceding, for the purposes of this case, that an accounting was permissible under the issues, we are unable to agree with the findings and conclusions of the trial court as the result of such accounting, and our reasons, briefly stated, are as follows: We think the purchase price agreed upon for plaintiffs' equity in the land was \$4,500, instead of \$5,500, as found by the trial court. There is no evidence in support of such findings. It will be observed that plaintiffs positively denied in their complaint that a sale was made at any price, and Geo. W. Ferris as positively denied the same in his testimony. That a sale was made is perfectly apparent, not alone from the defendant's testimony, which is corroborated by several disinterested witnesses, who swore to admissions made by Ferris to such effect; but the conduct of the latter in disposing of his seed grain, horses, agricultural implements and machinery, and voluntarily yielding possession of the land to defendant shortly thereafter, tends strongly to corroborate such fact. The only direct testimony as to the purchase price agreed upon is that of defendant, who swore that it was \$4,500. That defendant refused to pay \$5,500 is shown by the evidence of Ferris himself, who testified that he offered to sell at that price, but defendant declined such offer, and made a counter proposition to pay \$4,500. We have searched the record carefully, and are unable to find even a scintilla of evidence to support the finding that defendant agreed to pay \$5,500, or any sum other than \$4,500.

Upon the question as to the credits to which plaintiff is entitled as proceeds of the auction sale of personal property, we think the preponderance of the testimony shows that defendant received but \$92.70 cash and \$316.50 in notes. These items, together with the price to be paid for plaintiffs' equity in the land, make a total credit of \$4,909.20 due Ferris after the auction sale held on April 13th. It appears beyond dispute that on April 21st the parties had a full and complete accounting and settlement of their differences, and an agreed balance of about \$1,506 was found to be due defendant. At that time Ferris was indebted to defendant as follows: Amount paid by defendant to Wells-Dickey Company under land contract, including taxes and liens on property, \$2,910; amount due on the note of \$2,857.51, given by Ferris to defendant on January 1, 1903, and sums paid by defendant to various persons at plaintiff's request on notes outstanding against him. These debits in the aggregate amounted to \$6,415.85, and, after deducting plaintiff's said credit of \$4,909.20, a balance is left of \$1,506.65. These items are positively sworn to by the defendant, and the fact that such accounting and settlement took place and such balance was agreed to is fully corroborated by the witness Lowden, as well as by the plaintiff's act in executing and delivering to defendant on that day a bill of sale of all the remainder of the personal property as security. The consideration mentioned in this bill of sale was \$1,500; and it was agreed that the property included therein should be sold by Jensen, and the proceeds applied on such balance. It appears that defendant pursuant thereto disposed of these chattels, receiving therefor but \$1,383, thus leaving a small balance in defendant's favor.

We are therefore firmly convinced from the testimony that the finding of the trial court of a balance in plaintiffs' favor of \$1,876.25 is without support in the evidence, and also that, conceding plaintiffs' right to an accounting in this action, they have failed to show any balance due them or either of them.

For the foregoing reasons, the judgment is reversed, and the district court is directed to dismiss the action; appellant to recover his costs on this appeal. All concur.

(114 N. W. 372.)

EX PARTE CORLISS.

Opinion filed Oct. 23, 1907.

Contempt — Right to Visit Grand Jury Room.

1. Petitioner was adjudged guilty of contempt of court for wilfully violating an order excluding him from visiting the grand jury room while the grand jury were in session. He seeks to justify his action upon the grounds:

(1) That he was a duly appointed and qualified assistant state's attorney of the county.

(2) That he was employed by the board of county commissioners to assist the state's attorney in the discharge of certain duties; and

(3) That he was a duly appointed and qualified deputy enforcement commissioner of the state under the provisions of chapter 187, p. 303, of the Laws of 1907.

Held, for reasons stated in the opinion, that neither his appointment as assistant state's attorney nor his employment by the board of county commissioners vested in him any right to visit such grand jury sessions.

Same — Constitutional Law — Enforcement — Commissioner.

Held, also, that no such right could be claimed under his appointment as deputy enforcement commissioner for the reason that the law creating such alleged office is unconstitutional and void for the reasons set forth at length in the opinion.

Spalding, J., dissenting.

Guy C. H. Corliss was adjudged guilty of contempt of court for violating an order of the district court of Burleigh county, and was committed in default of payment of a fine imposed upon him. He petitions this court for a writ of habeas corpus, alleging that such order and commitment were unauthorized and void. Writ denied.

Guy C. H. Corliss, pro se, and *Asa T. Patterson*, for petitioner.
B. D. Townsend, for respondent.

FISK, J. Application for writ of habeas corpus. Petitioner alleges that he is deprived of his liberty through a commitment issued by the district court of Burleigh county pursuant to a judgment of that court adjudging him in contempt for violating an order excluding him from the grand jury room while a grand jury was in session. Petitioner admits that he willfully violated such order, but he challenges the validity of the same, claiming the right to enter such room for three reasons: (1) Because he claims to

be a duly appointed and qualified assistant state's attorney of Burleigh county: (2) because he claims to have a valid contract of employment with the board of county commissioners of said county to assist the state's attorney in the performance of his official duties; and (3) because he is a duly appointed and qualified deputy enforcement commissioner. It is stipulated that the merits may be disposed of upon the preliminary application for the writ.

Petitioner admits that prior to such official appointments and employment he had been employed by private individuals to prosecute certain criminal cases against one Edward G. Patterson for alleged violation of the law of this state prohibiting the manufacture and sale of intoxicating liquors, and that said official appointments and official employment were made for the purpose of investing him with legal authority in said criminal prosecutions, and to authorize him to attend before said grand jury in the interest of such private employers. Petitioner concedes that his appointment as assistant state's attorney was and is void for the reason that he is a nonresident of Burleigh county. His employment by the board of county commissioners was concededly for a nominal consideration. It was not a good-faith employment for the purpose of assisting the state's attorney in the discharge of his public duties, but was, as conceded by him, as above stated, for the purpose of gaining admission to the sessions of the grand jury for the purpose of discharging his duties under such private employment. Even if a good-faith employment by the county commissioners would legally qualify him to visit the grand jury session, which we seriously question, we are clear that he had no such right under the employment in question, as he concedes, as before stated, that it was merely to enable him to fulfill a contract of employment entered into with private individuals. Under such facts, it was manifestly improper for him to appear before such grand jury, and the district judge properly excluded him therefrom.

Petitioner's right to enter such room, therefore, necessarily depends upon his official character of deputy enforcement commissioner. The facts are not in dispute, but in opposition to the granting of the writ it is urged that the law creating the offices of enforcement commissioner and deputy enforcement commissioner, being chapter 187, page 303, of the Laws of 1907 of this state, is unconstitutional and void for several reasons, only one of which it is necessary for us to notice, as in our opinion the same is clearly

sound; and this is the fact that the statute in question violates those provisions of our state constitution by which the people reserved the right to have the public functions which are attempted to be conferred upon the officers created by said act discharged by officers of their own selection. In other words, the people in framing the constitution, were careful to safeguard this right in unmistakable language by providing, in effect, that certain public duties should be performed by persons elected by them; and among the public duties to be only thus performed are those pertaining to the offices of state's attorneys and sheriffs. We are not unmindful of the well-established rule that the courts should uphold legislative enactments unless they are clearly violative of some provision, either expressed or necessarily implied, of the organic law of the state. As stated by Mr. Cooley in his work on Constitutional Limitations, p. 218: "The question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes; but it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

Keeping in mind this rule, let us examine the act in question. By section 1 the governor is authorized to appoint a capable citizen of this state to be enforcement commissioner, said enforcement commissioner to be paid a salary of \$2,000 per annum, and his actual expenses, and to maintain an office at the capital. Section 2 requires that such appointee shall be an attorney at law, and he is authorized to exercise in any part of the state, with the advice and under the direction of the governor, all of the common-law and statutory powers of state's attorneys in their respective counties in the enforcement of the law against the manufacture and sale of intoxicating liquors. Section 3 provides for the appointment of one deputy commissioner whenever the commissioner may deem such deputy necessary. Such deputy shall have the same powers as are given to the enforcement commissioner. Section 4 pro-

vides that "the enforcement commissioner shall appoint such number of special enforcement sheriffs as in his judgment may be necessary, who shall have throughout the state all the common law and statutory powers of sheriffs in their respective counties in the enforcement of the law against the manufacture and sale of intoxicating liquors; * * * and they shall hold office during the pleasure of said enforcement commissioner." Section 5 provides for the giving of official bonds by these various officers. Section 6 provides that "it shall be the duty of said deputy commissioner and special sheriffs to exercise all the powers here conferred when, where and as directed by said enforcement commissioner." The remainder of the section relates merely to the payment of the expenses of these officers, and fixes the compensation of the deputy commissioner and special sheriffs. Section 7 provides for the taxation of costs for such enforcement commissioner and deputy commissioner in all actions in which they appear, which costs shall be the same as are allowed to be taxed for state's attorneys under the prohibition law of this state, and also for the taxation of costs for special sheriffs, which shall be the same as are taxed for sheriffs in such cases. Section 8 is as follows: "The said enforcement commissioner, upon being satisfied that the local authorities fail to enforce the law against the manufacture and sale of intoxicating liquors in any county, city, village or town of this state, shall, subject to the limitation of section 2 hereof, with the aid, assistance and co-operation of the said deputy commissioner and one or more of such special sheriffs, enforce said laws." The remaining sections of the law are not material to a decision of the questions here involved.

We think it clear, from the language employed, that it was the intention of the legislative assembly, in the enactment of this law, to vest in the enforcement commissioner the power, whenever he deems the exercise thereof necessary, to displace the regularly elected state's attorney and sheriff in any county, so far as the enforcement of the so-called "Prohibition Law" is concerned in such county, and appoint in their stead a deputy enforcement commissioner and a special enforcement sheriff to discharge the duties of such regularly elected officers during the pleasure of the enforcement commissioner.

Has the legislative assembly, under the constitution of this state, the power to do this? In disposing of this important question

we cannot be controlled by the desirability or seeming necessity for such a law or by the beneficial results which might be obtained thereunder. It is far more important that the integrity of the constitution should be maintained unimpaired than that any law, however desirable, which conflicts therewith, should be upheld. Whether the present laws are adequate, or whether some other remedy for the evil sought to be reached by the act in question may be lawfully provided by the legislative department of the state, is not material to this inquiry. We are to pass upon the law in question in the light of the constitution, and if it can be sustained as a constitutional exercise of the legislative power delegated by the people in their sovereign capacity to the legislative assembly, it is our solemn duty to sustain it; but if, in our judgment, the act is clearly violative of the constitution, we should not hesitate to perform the duty of pronouncing the same unconstitutional and void.

We take it to be a self-evident proposition that if the legislative assembly had the power to pass the act in question, then they had the power to go further and provide that such special enforcement officers should have the right to permanently displace the said county officers. Not only this, but they had the power to go still further and provide for the appointment of special officers by the central authority to perform all duties pertaining to the enforcement of all criminal laws in lieu of the regularly elected county officers provided for in the constitution, and thus frustrate to this extent the evident purpose of the framers of the constitution in providing for the election by the people in each county of officers for the performance of such public functions. By the express provisions of the act in question the enforcement commissioner, a mere appointee of the governor, may, whenever in his judgment he thinks it necessary or advisable, appoint any number of so-called "enforcement sheriffs" in any county in the state without consulting the wishes of the citizens of such county, and even against their will, and such appointed officials are clothed with all the powers and duties (in the enforcement of the prohibition law) possessed by the sheriff whom the people have, by the exercise of their sovereign right, expressly declared shall be elected by them. The same is true with reference to state's attorneys and the performance of their duties. If the legislative assembly has the power to do this, why has it not the power to provide for the appoint-

ment of a special enforcement governor, or a special enforcement attorney general, or a special enforcement court? The governor, attorney general and the judges are no more constitutional officers than are state's attorneys and sheriffs. It seems too obvious for discussion that the framers of the constitution, in providing for the election of these officers by the people, thereby reserved unto themselves the right to have the inherent functions theretofore pertaining to said offices discharged only by persons elected as therein provided. The naming of these officers amounted to an implied restriction upon legislative authority to create other and appointive officers, for the discharge of such functions. If this is not true, then of what avail are the provisions of the constitution above referred to? If these constitutional offices can be stripped of a portion of the inherent functions thereof, they can be stripped of all such functions, and the same can be vested in newly created appointive officers, and the will of the framers of the constitution thereby thwarted. The fact that these appointive officers might or would discharge the duties better than the officers provided for in the constitution is not material. If these latter officers fail to discharge their duties, and it is desirable to provide for other officers to perform such duties, the remedy is with the people. They may amend the constitution, or, through the power delegated to the legislative assembly, provide for their removal from office as has been done. Under the act in question the enforcement commissioner is vested with the power of determining whether the state's attorney and sheriff of any county are discharging their duties with reference to the enforcement of the prohibition law. This is a broad discretion, and may be exercised in the interest of strict enforcement of the law or otherwise, and, therefore, what guaranty is there that such appointive officers would enforce the law as well as the officers elected by the people? But this is a matter which perhaps pertains more properly to the wisdom of such an enactment rather than to the question of its constitutionality; but the point we desire to make is that the framers of the constitution evidently considered it more conducive to the public welfare to have the functions of these offices performed by officials elected by the people of the respective counties than to intrust them to officers otherwise chosen.

Section 173 of our constitution is relied upon as upholding this statute. This section, after enumerating the county officers and

prescribing that they shall be elected by the electors of the county, further provides that their duties shall be prescribed by law; and it is argued that under the power to prescribe such duties the legislative assembly may take them away, or a portion thereof, and confer them upon other officers not elected by the people, just as is attempted to be done by the act in question. Such argument, carried to its logical and inevitable result, would lead to the monstrous doctrine that the constitution means nothing, and, notwithstanding its plain provisions, the legislative assembly may provide that the duties pertaining to all these offices shall be discharged by officers appointed in some manner prescribed by them. The act in question does not purport to prescribe the duties of these constitutional officers, but it attempts to vest in other persons not elected the power to perform such duties, and to this extent supplant these constitutional officers. Such legislation, in our opinion, cannot be sustained. It strikes a blow at the very foundation principles of our form of government. During the early history of this state, Chief Justice Corliss, in *State ex rel. Faussett v. Harris*, 1 N. D. 194; 45 N. W. 1102, recognized the distinction in this respect between constitutional offices and those created by the legislative assembly. Speaking of the latter kind of office he says: "The office is not imbedded in the constitution, as is the case with respect to the offices named in section 173 of the constitution. These are constitutional offices. The other offices, including that of county assessor, are offices which, under the express provisions of section 173, the legislature may abolish by creating other offices to take their place." In that case the court had under consideration the power of the legislature to abolish the old office of county assessor and to confer the duties upon district assessors, and the court held that, as the office was of legislative creation and therefore not "imbedded in the constitution," the act in question was valid.

If the offices mentioned in section 173, which includes those of state's attorney and sheriff, "are imbedded in the constitution," it inevitably follows that they cannot be stripped by the legislature of the important duties inherently connected therewith, for if this can be done, then these offices were "imbedded in the constitution" for no purpose. We do not deny the power of the legislature to prescribe duties for these officers, which power carries with it by implication the right to change such duties from time to time

as the public welfare may demand; but we deny its power to strip such offices, even temporarily, of a portion of their inherent functions and transfer them to officers appointed by central authority. This, as we view it, is a plain violation of the constitution, and is subversive of the obvious intent of its framers to reserve to the people of each county the right, through their elected officials, to enforce the criminal laws of the state, as well as to perform other functions of government by them so long performed and so well understood. It is apparent that the framers of the constitution, by section 173 and other sections embodied in that instrument, intended to carry out a scheme of government by which the political subdivisions of the state known as "counties," should be given the right of local self-government, which should apply not only to local affairs of government, but also to confer upon the people of each county certain governmental function in which the people of the entire state are also interested. We do not mean by this that the people of each county had delegated to them these functions unrestricted by proper legislative regulations, for, as we said before, it is competent for the legislative assembly to provide by law for removals in case of malfeasance or misfeasance in office, and to provide a method of filling such vacancies. But it is an entirely different proposition to say that the legislative assembly may go further and create a new office to be filled by central authority, and transfer to such appointive officer the duties essentially and constitutionally belonging to the county office.

In the argument of this case counsel called to our attention a great many cases dealing with the question of home rule or local self-government. There is much conflict of views among the courts upon this question, some holding that this right of local self-government does not extend to functions of government in which the people of the entire state are interested, while others hold to the contrary view. Most of the cases deal with the question as applied to municipalities, and not to counties or other political subdivisions of the state. Upon an analysis of the cases it will be found that most of the decisions turn upon the question as to whether the implied right of local self-government is guaranteed to municipalities under the constitution. It must not be overlooked that there is a wide distinction in this respect between counties and municipalities, the former, by express provisions of the constitution, having been made political subdivisions of the state, while cities and other

municipalities, so far as this state and most other states are concerned, are mere creatures of the legislative department, and, being such, are, of course, in all respect subject to legislative regulation and control. As to county organizations see constitution, article 10.

On account of the importance of the question here involved we deem it proper to review some of the leading decisions relating to the right of local self-government. In the following cases it has been held that towns and cities are entirely subject to legislative control in the absence of a constitutional provision to the contrary: *People v. Draper*, 15 N. Y. 532; *Mayor, etc., v. State*, 15 Md. 376, 74 Am. Dec. 572; *State v. County Court*, 34 Mo. 546; *Booth v. Town of Woodbury*, 32 Conn. 118; *Webster v. Town of Harwinton*, 32 Conn. 131; *People v. Mahaney*, 13 Mich. 481; *People v. Shepard*, 36 N. Y. 285; *Town v. Jenkins*, 57 N. Y. 177; *Barnes v. Dist. of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *State v. Covington*, 29 Ohio St. 102; *Pumphrey v. Mayor, etc.*, 47 Md. 145, 28 Am. Rep. 446; *Burch v. Hardwicke*, 30 Grat. (Va.) 24, 32 Am. Rep. 640; *Perkins v. Slack*, 86 Pa. 270; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *Coyle v. McIntire*, 7 Houst. (Del.) 44, 30 Atl. 728, 40 Am. St. Rep. 109; *State v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; *State v. Hunter*, 38 Kan. 578, 17 Pac. 177; *Com. v. Plaisted*, 148 Mass. 386, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566; *Trimble v. People*, 19 Colo. 187, 34 Pac. 981, 41 Am. St. Rep. 236; *State v. Williams*, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465. On the other hand, the following authorities, among others, lay down the proposition that although the constitution is silent upon the subject, the legislature cannot in any way interfere with certain powers of municipalities. In other words, they recognize the implied right of local self-government as applied to cities and towns. *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People v. Albertson*, 55 N. Y. 50; *People v. The Common Council of Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Park Com'rs v. Mayor, etc.*, 29 Mich. 343; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *Allor v. Wayne County*, 43 Mich. 76, 4 N. W. 492; *People v. Porter*, 90 N. Y. 68; *Robertson v. Baxter*, 57 Mich. 127, 23 N. W. 711; *Atty. Gen. v. Detroit*, 58 Mich. 213, 24 N. W. 887; *Wilcox v. Paddock*, 65 Mich. 23, 31 N. W. 609; *State v. Denny*, 118 Ind. 382; *City of Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; *Board of Metropolitan Police v. Board*

of Auditors, 68 Mich. 576, 36 N. W. 743; *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; *Matter of Brenner*, 170 N. Y. 185, 63 N. E. 133; *People v. Tax Com'rs*, 174 N. Y. 417, 67 N. E. 69. Other authorities might be cited, but the above are sufficient to show how hopelessly in conflict are the adjudications upon this question.

The question of the implied right of local self-government as to municipalities necessitates a construction of the constitution and the extent of powers conferred by said instrument upon the legislative department of the state. In Cooley's great work on *Constitutional Limitations* (6th Ed.) 49, it is said that a constitution "grants no right to the people, but is the creature of their power, the instrument of their convenience. * * * A written constitution is, in every instance, a limitation upon the powers of government in the hands of agents."

In *State v. Denny*, *supra*, it was said: "At the adoption of the state constitution all power was vested in the people of the state. The people still retain all power, except such as they expressly delegated to the several departments of the state government by the adoption of the constitution. In the first section and first article of the constitution it is declared that 'all power is inherent in the people.' It is contended by counsel that, as certain rights were granted and certain other rights reserved by the people, therefore all rights were granted, except such as were expressly reserved. The peculiarity of the theory is that while the people, by the constitution, made grants of power to three different departments of government, it is contended that all power that was at that time in the grantor, the people, passed to one branch of the government, viz., the political or legislative branch, and that it took all power not mentioned in the instrument, and the executive and judiciary took only such as was expressly granted to them, and the people retained such only as was specifically named and reserved. It is certainly a novel method of construction, and contrary to all rules for construing contracts, deeds, wills and other instruments, and it seems to us that the proposition need but to be stated to prove its fallacy. In construing and giving an interpretation to the constitution, we must take into consideration the situation as it existed at the time of its adoption, the fact expressed in the instrument that all power is inherent in the people, the rights and powers vested in and then exercised by the people, the existence of cities

and towns and the right of local self-government exercised by them, and the laws in force and form of government existing at the time of its adoption."

Mr. Cooley, in speaking of the extent of powers delegated by the people to the legislature, says: "They must be understood to grant the whole legislative power which they possessed, except so far as, at the same time, they saw fit to impose restrictions. While, therefore, the Parliament of Britain possesses completely the absolute and uncontrolled power of legislation, the legislative bodies of the American states possess the same power, except, first, as it may have been limited by the constitution of the United States, and, second, as it may have been limited by the constitution of the state." Cooley's Const. Lim. (6th Ed.) 205.

In *People v. Draper*, supra, Chief Justice Denia stated the rule thus: "The people, in framing the constitution, committed to the legislature the whole lawmaking power of the state which they did not expressly or impliedly withhold. * * * The constitution was not framed for a people entering into a political society for the first time, but for a community already organized, and furnished with political and legal institutions adapted to all or nearly all the purposes of civil government; and that it was not intended to abolish these institutions, except so far as they were repugnant to the constitution then framed."

Again, in *People v. Hurlbut*, supra, that eminent author and jurist, Judge Cooley, in writing the opinion, said: "If this charter of state government which we call a constitution were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood and mutual responsibility in neighborhood interests; the precepts that have come from the revolutions which overturned tyrannies; the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying on king or legislature at a distance to do so—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit—that which gives it force and attraction, which makes it valuable, and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hun-

dred years, many of which, in their expressions, have seemed equally fair, and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give—this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone.”

It is thus apparent that, in construing a constitution, the same must be construed in the light of contemporaneous history—of conditions existing at and prior to its adoption. By no other mode of construction can the intent of its framers be determined and their purpose given force and effect. In other words, the spirit, as well as the letter of the instrument, must be given effect. It was the unwritten and necessarily implied provisions of the constitution with which the courts were dealing in the foregoing cited cases, in which the implied right of local self-government for municipalities was affirmed on the one hand and denied on the other. If the constitution had expressly created these municipalities and provided for the election of their officers by the people, as our constitution does as to counties and their officers, then we apprehend that these cases would not have arisen. We do not claim that the act in question is unconstitutional because it violates any implied constitutional restriction of legislative power to interfere with the right of local self-government, but we do assert that the people, in framing the constitution and in providing for the election of those officers, thereby expressly vested in such officers, and intended to vest in them, the function of administering the criminal laws of the state as theretofore administered by such officers; that when a method of administration of laws is provided for by the constitution, the legislative assembly cannot provide a different method. They cannot transfer the duties of any such officers to a new office created by them. The constitutional method of local administration of laws cannot be changed by the legislative assembly simply because they are of the opinion that the local officers will not honestly administer such duties. In other words, in adopting the constitution the people decided that these local officers will administer the law better than any one else, and the legislative department is powerless to impeach their judgment.

A very able and exhaustive article upon the subject of “The Right to Local Self-Government” is contained in volumes 13 and 14

of the Harvard Law Review. The author of this article, Mr. Eaton, has the following to say regarding some of the leading cases upon this subject: "The People v. Draper, 15 N. Y. 532. In this case it was held that the reservation contained in section 2, article 10, of the constitution of New York of 1846, to the electors or local authorities of the right to elect or appoint county, city, town and village officers, relates only to such offices as existed when the constitution went into effect, and therefore that the legislature may create new civil divisions of the state embracing two or more existing counties, cities, towns or villages, providing the old civil divisions be not abolished. Consequently the act to establish a Metropolitan Police District, consisting of the counties of New York, Kings, Richmond and Westchester, was upheld as constitutional. * * * The pre-existing system of police was abolished, together with the control over the police by the former authorities of the towns, cities, etc., of the new district." He refers to the dissenting opinion of Brown, J., with the statement that "the whole dissenting opinion should be carefully read, especially as his conclusions have been adopted since then, as we shall see, by the New York Court of Appeals." This able article then continues: "The plain statement of the facts connected with this case by Prof. Goodnow (page 20) in his Municipal Home Rule, shows that the historical antecedents of New York are such as to warrant the conclusion that the case was wrongly decided." He then quotes from Prof. Goodnow as follows: "'The City of New York received from the English kings during the colonial period a charter, which, on the declaration of independence of the colony of New York and the establishment of the new state of New York was confirmed by the first constitution of the state. Article 36. For a considerable period after the adoption of this constitution, changes in that charter were made upon the initiation of the people of the city, which initiation took place through the medium of charter conventions whose members were elected by the people of the city, and no statute which was passed by the legislature of the state, relative to the affairs of the city of New York, took effect within the city until it had been approved by the city. About the middle of the century, the legislature was called upon to interfere in the administration by the city of certain matters which affected the state as a whole. One of the most marked examples of this central interference, made without the consent or approval

of the city or its people, is to be found in the adoption of the metropolitan police bill in 1857. The administration of the police in the period immediately preceding 1857 had been accompanied by great scandal and was regarded as extremely inefficient. Partly because of this, and partly, it is believed, for reasons of partisan politics, the legislature provided for the formation of a metropolitan police district which embraced all the territory of certain outlying districts. On account of the unprecedented character of such an act, the people of New York, led by the mayor, attempted to resist the enforcement of the bill, and such resistance led to positive bloodshed. The question, however, was finally referred to the courts, and the Court of Appeals (*People v. Draper*, 15 N. Y. 532) held that the action of the legislature was perfectly proper, inasmuch as the administration of the police was not a local function, but was a matter which affected the state as a whole, and might therefore be put into the hands of authorities having jurisdiction over a territory greater than that of any one city, and appointed by the central government of the state. The success of the legislature in thus interfering in what had been considered by the people of New York a branch of municipal administration led it to carry its interference into other branches where its action could not be so well justified. * * * The application of the principle thus established has been of great disadvantage to the government of the various cities within the state, and, as has been pointed out by the Hon. Seth Low in his chapter on Municipal Government, in Bryce's *American Commonwealth* (1st Am. Ed.) vol. 1, p. 639, the habit of interference in city action has become to the legislature almost a second nature.'” Continuing, Mr. Eaton says: “The case of *People v. Drayer* was followed by *People v. Shepard*, 36 N. Y. 285, which involved the constitutionality of an act establishing a capital police district, embracing parts of Albany and Rensselaer counties, the city of Schenectady, and the lines of railroad between Albany and Schenectady. Emboldened by success, the politicians next sought to extend the field of their peculiar operations by passing an act ‘To establish the Rensselaer police district,’ to consist of the city of Troy and a contiguous strip, the principle supposed to have been established in *People v. Draper* being relied upon as giving color to this act. *People v. Albertson*, 55 N. Y. 50. The satirical statement in the opinion, last paragraph, page 67 of 55 N. Y., shows that the court well understood the nature of the

forces securing such legislation; 'as the Capital Police District was an experiment, and, as it resulted, a successful experiment, upon the principle supposed to be established in *People v. Draper*, the act before us is an experiment, and in the direction of an encroachment upon the constitution, an improvement upon both acts, and marks the progressive spirit of the day.' Cooley also well understood the nature of these forces—'a remarkable case of evasion to avoid the purpose of the constitution, and still keep within its terms, was considered in *People v. Albertson*, 55 N. Y. 50.' (Cooley, Const. Lim. 207, note 1.) The case of *People v. Draper* is criticised, distinguished and regretted at pages 63, 64, 65 of 55 N. Y., of *People v. Albertson*; and the case of *People v. Shepard* is questioned at pp. 65, 66, 67 of 55 N. Y., with strong approval given to Brown, J.'s, dissenting opinion in *People v. Shepard*, at page 64 of 55 N. Y.: 'That decision has now stood so long judicially uncondemned, although never, I think, satisfactory to the public or the legal profession, that it might not be proper, under any circumstances, to review or overrule it; and it is to be hoped, in the interests of constitutional government by the people, that the occasion to reaffirm its doctrines may never arise. To my mind, the dissenting opinion of Judge Brown, concurred in by Judge Comstock, presents unanswerable arguments why the decision should have been different.' That the cases of *People v. Draper* and *People v. Shepard* are considered as overruled at the present time in New York, sufficiently appears in *Rathbone v. Wirth*, 6 App. Div. 277, at page 295, 40 N. Y. Supp. 535, at pages 545 and 546: 'But neither the *Draper* nor *Shepard* Case, I think, can any longer be considered authority in this state, since the decision of the case of *People v. Albertson*, 55 N. Y. 50.' Upon appeal to the Court of Appeals the judgment in the Supreme Court was affirmed. *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408. The opinion given in both courts all deserve careful study. The result is that the doctrine laid down in *People v. Draper* has been successfully shaken, and is no longer the law in New York. It is no longer an authority. It may be claimed that this is largely in consequence of section 2, article 10, of the constitution of New York, 1846, re-enacted in the constitution adopted November 6, 1894, and in force January 1, 1895. But it is submitted that this section is merely declaratory of what the law would be as to the powers of cities, towns and villages to elect their own

officers, even without this statement in the constitution, and therefore has no bearing on the matter at issue."

We have quoted thus at length from this able article because its clear and forcible logic carries conviction to our minds of its absolute soundness. As late as 1903 the Court of Appeals of New York, in the case of *People ex rel. Met. St. Ry. Co. v. Tax Com'rs*, 174 N. Y. 417, 67 N. E. 69, 63 L. R. A. 884, 105 Am. St. Rep. 674, had under consideration the validity of a statute taxing for the first time in the history of that state special franchises, and providing for a state board of tax commissioners appointed by the governor. It was urged that the act in question violated the home-rule provisions of the constitution, for the reason that it deprived the local taxing officers of the functions of taxation. The validity of the act was upheld, but the decision was placed upon the ground that the function of assessing a special franchise did not, in its nature, belong to a county, city, town or village, as such function had never been exercised by such local officers, but that the function belonged to the state, by which it was exercised for the first time. The court said: "It did not come within the experience of former times, and was not contemplated by the framers of the constitution." The opinion was written by Judge Vann, and concurred in by all the other justices, and the same contains a very able and exhaustive treatment of the doctrine of local self-government, reviewing all the prior decisions of that court upon the subject. After reviewing the history in that state, and after referring to the provisions of the constitution of New York similar to section 173 of our constitution, the opinion reads: "These and other commands of the different constitutions, when read in the light of prior and contemporaneous history, show that the object of the people in enacting them was to prevent centralization of power in the state, and to continue, preserve and expand local self-government. This was effected through a judicious distribution of the power of selecting public officers, by assigning the choice of local officers to the people of the local divisions, and to the people generally, those belonging to the state at large. * * * The principle of home rule is preserved by continuing the right of these divisions to select their local officers, with the general functions which have always belonged to the office. Unless the office, by whatever name it is known, is protected, as the courts have uniformly held, the right to choose the officer would be lost, for with his former

functions gone he would not be the officer contemplated by the constitution, even if the name were retained. Unless the office or officer is mentioned *eo nomine* in the constitution, the same may be changed, or the office abolished, provided the functions, if retained at all, remain in some officer chosen by the locality. Local functions, however, cannot be transferred to a state officer. The legislature has the power to regulate, increase or diminish the duties of the local officer, but it has been steadfastly held that this power is subject to the limitation that no essential or exclusive function belonging to the office can be transferred to an officer appointed by central authority. The office may go, but the function must be exercised locally, if exercised at all. While no arbitrary line is drawn to separate the powers of local and state officers, the integrity of the local office is protected, with its original and inherent function unimpaired. It is interference, whether direct or indirect, with the vital, intrinsic and inseparable functions of the office as thus defined and understood that the constitution prohibits."

In *State v. Hastings*, 11 Wis. 448, the court held unconstitutional an act passed by the legislature providing for the appointment and prescribing the duties of a state comptroller, upon the ground that the function of auditing accounts was, by the constitution, vested in the secretary of state, who was made *ex officio* auditor by the constitution. The act in question did not purport to supplant the secretary of state in the performance of this function of auditing accounts, but it made it the duty of this newly created officer to audit the same after the secretary of state as such *ex officio* auditor had done so. The court said: "The act, taken all together, looks like a studied effort to attain indirectly what it was evident to the framers could not be accomplished directly. The result is that we have two auditors instead of one, both of whom must act in succession, before any business can be transacted. The question arises whether, under the foregoing provision of the constitution, the legislature have the power to create a second auditor or officer authorized to perform the same duties, whose concurrence is necessary before the acts of the constitutional auditor shall take effect. We think they have not, and that the functions of that officer cannot, in whole or in part, be transferred to, or be exercised concurrently or otherwise by, any other person or officer. It falls directly within the rule that the express mention of one thing implies the exclusion of another. *Expressio unius est exclusio*

alterius. This rule applies as forcibly to the construction of written constitutions as other instruments. * * * A constitution being the paramount law of the state, designed to separate the powers of government and to define their extent and limit their exercise by the several departments, as well as to secure and protect private rights, no other instrument is of equal significance. It has been very properly defined to be a legislative act of the people themselves in their sovereign capacity; and, when the people have declared by it that certain powers shall be possessed and duties performed by a particular officer or department, their exercise and discharge by any other officer or department are forbidden by a necessary and unavoidable implication. Every positive delegation of power to one officer or department implies a negation of its exercise by any other officer, department or person. If it did not, the whole constitutional fabric might be undermined and destroyed. This result could be as effectually accomplished by the creation of new officers and departments exercising the same power and jurisdiction as by the direct and formal abrogation of those now existing. And, although the exercise of this power by the legislature is nowhere expressly prohibited, nevertheless they cannot do so. The people having in their sovereign capacity exerted the power and determined who shall be their auditor, there is nothing left for the legislature to act upon." The court, after referring to certain New York decisions as sustaining the above rule, further says: "This rule of construction extends to every part of the instrument, and, if a violation of it is allowed in the case of the auditor, it is difficult to see why it should not be in the case of any other officer or department. Thus, the legislature might with equal propriety create new courts of justice, usurping and exercising the same power and jurisdiction as those established by the people, and a new executive, to correct the mistakes and control the action of the one chosen by them. It seems to us clear that the legislature could do neither, and that so much of the act under consideration as attempts to transfer to the so-called "Comptroller" the functions of auditor, and to clothe him with authority to control or reverse the acts of that officer, is unconstitutional and void."

The foregoing opinion fully sustains what we have heretofore said to the effect that, the constitution having named certain officers, the functions essentially and inherently connected with such of-

fices must be discharged by these constitutional officers and none others. It will be noticed that the duties to be performed by the secretary of state as ex-officio auditor were not prescribed by the constitution any more than the duties of state's attorneys and sheriffs are prescribed in our constitution, but it was held by the Wisconsin court that by the naming of these officers in the constitution the framers thereof intended that the public functions appertaining to such offices must be performed by such constitutional officers.

In *State v. Brunst*, 26 Wis. 412, 7 Am. Rep. 84, the Supreme Court of that state was again called upon to pass upon a similar question. By an act of the legislature of that state passed in 1870, it was declared that the building known as the "House of Correction" of the county of Milwaukee, should constitute the county jail of the county, and making the inspector thereof ex officio the jailer of the county, giving him the exclusive charge and custody of such jail and of the prisoners therein, and making it the duty of the sheriff to deliver to said inspector on demand all prisoners in the old jail, etc. A writ of mandamus was applied for to compel the sheriff to comply with this statute, and he resisted the application for the writ upon the ground that the act was unconstitutional, contending that the legislature could not take from his office his public function and transfer the same to the re-lator. He insisted that by virtue of his office of sheriff, and as a part and parcel of the duties from time immemorial belonging to his office by law, he, as such sheriff, was entitled to the custody of the jail and the prisoners therein, and that it was no more competent for the legislature to deprive him of such duties and transfer them to another officer than to deprive him of the right to execute writs and processes or the duty of conserving the public peace. We quote from the opinion of the court. "It seems to us that this view of the question is rational, and in harmony with the spirit of the constitution. The office of sheriff, in a certain sense, is a constitutional office; that is, the constitution provides that sheriffs shall be chosen by the electors of the respective counties. * * * Now, it is quite true that the constitution nowhere defines what powers, rights and duties shall attach or belong to the office of sheriff. But there can be no doubt that the framers of the constitution had reference to the office with those generally recognized legal duties and functions belonging to it in this coun-

try; and in the territory, when the constitution was adopted. Among those duties, one of the most characteristic and well acknowledged was the custody of the common jail and of the prisoners therein. This is apparent from the statutes and authorities cited by the counsel for the respondent. And it seems to us unreasonable to hold, under a constitution which carefully provides for the election of sheriffs, fixes the terms of the office, etc., that the legislature may detach from the office its duties and functions, and transfer those duties to another officer. * * * If the legislature can do this, why may it not deprive the sheriff of all the duties and powers appertaining to his office, and transfer them to some officer not chosen by the electors? It would certainly be a very idle provision of the constitution to secure to the electors the right to choose their sheriffs and at the same time leave to the legislature the power to detach from the office of sheriff all the duties and functions by law belonging to that office when the constitution was adopted, and commit those duties to some officer not elected by the people. For this would be to secure to the electors the right to choose a sheriff in name merely, while all the duties and substance of the office might be exercised by and belong to an officer appointed by some other authority."

The court in its opinion in the foregoing case, refers to *State v. Dews*, R. M. Charit. (Ga.) 397, which was decided early in the history of that state, as holding to a contrary view, but cites, as sustaining its opinion, *Warner v. People*, 2 Denio (N. Y.) 272, 43 Am. Dec. 740; *State v. Hastings*, 10 Wis. 525, and *McCabe v. Mazzuchelli*, 13 Wis. 478. The case from Georgia was urged before us upon the argument of the cast at bar as announcing the correct rule. This case was decided in 1835 by the superior court of the Eastern district of Georgia, and in so far as the points actually raised and determined in that case were concerned was perhaps correctly decided, but we consider it of but very little, if any, weight as an authority upon the question here involved and expressly decided by the Wisconsin court.

In *O'Connor v. City of Fond du Lac*, 109 Wis. 253, 85 N. W. 327, 53 L. R. A. 831, the Supreme Court of Wisconsin had under consideration the home rule provision of their constitution, which is identically the same as that of New York, and the court cites and approves the construction adopted by the later New York decisions. Speaking of the constitutional provision aforesaid, the court ob-

served: "The purpose of that is plain, and has often been declared by the courts. It was to render secure the important right of local self-government—to give to the people of each locality the power to say and determine as directly as possible who shall perform the governmental functions that concern such localities only as organized subdivisions of the state. That right, under our system of government, has from the start been regarded as the very foundation thereof, and absolutely necessary to its success."

In the late case of *State v. Anson* (Wis.) 112 N. W. 475, the question of the constitutional limitation on legislative interference with local self-government for counties and municipalities is quite fully considered, and the prior adjudications of that court, as well as the courts of other states, are cited. The constitutional provision in question is as follows: "All county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct. * * * All officers whose offices may hereafter be created by law shall be elected by the people or appointed as the legislature may direct." The legislature of that state created the office of jury commissioners, and provided for the appointment of such commissioners by the circuit courts or judges of the state. The functions of these newly created officers were theretofore imposed upon certain county officers, who also had various other duties, the duties pertaining to the drawing of jurors being merely incidental. It was urged that this law violated the foregoing constitutional provision, but the court sustained the validity of the law; the decision, however, being placed upon the ground that at the time of the adoption of the constitution there were no officers known as "jury commissioners," either as county officers or otherwise. It is apparent that the decision would have been to the contrary had there existed, prior to and at the time of the adoption of the constitution, county officers charged with the performance of these functions. The court said: "It is not contended that at the time of the adoption of the constitution any officers known as 'jury commissioners' existed in this state, either as county officers or otherwise; but it is contended that the selection of names to go upon the jury list for the circuit courts of the state was at that time imposed upon certain county officers, who also had various other duties, and that the creation of an officer to exer-

cise that function is but an evasion of the constitutional restriction." After stating that the section of their constitution above quoted was taken substantially verbatim from the constitution of 1846 of New York, the opinion continues: "It had received no authoritative construction by the ultimate court of that state prior to its adoption here in 1848; but before serious questions arose in this state upon it, it did receive exhaustive discussion and construction in an opinion by Denio, J., in *People ex rel. Wood v. Draper*, 15 N. Y. 533, both the reasoning and decision in which were almost at once accepted and approved by this court. (Citing the Wisconsin authorities.) The general propositions declared in that case, and so accepted and approved, were that the purpose of this section of the constitution was to protect in a general way the policy of local self-government in cities and counties, to the extent at least that such officers as exercised the functions of such local government at the time of the adoption of the constitution should continue to be chosen by the locality, and from this was deduced the view that 'all other county officers' in the first sentence of the above quotation meant those existing at the time the constitution was adopted, and that, while the constitution in express terms permitted other methods of selection of incumbents of offices thereafter to be created, it could refer in that regard only to offices and officers different in kind from any formerly existing, otherwise the effect of the last clause would be to nullify the former by the mere creation of offices new in name, but in all practical effect mere perpetuates of the old ones. Hence was declared a limitation of the meaning of the words 'offices which may hereafter be created by law' to such as were not mere substitutes or equivalents for pre-existing offices. * * * In *State ex rel. Williams v. Samuelson* (Wis.) 111 N. W., at page 716, the offices permitted to be created by the legislature were described as those the duties of which 'are not such as were incident to some county office at the time of the formation of the constitution.' *State v. Hastings*, supra; *McCabe v. Mazzuchelli*, 13 Wis. 478; *State v. Brunst*, 26 Wis. 412, 7 Am. Rep. 84; *State v. Cunningham*, 88 Wis. 83, 57 N. W. 1119, 59 N. W. 503, and *Warner v. People*, 2 Denio (N. Y.) 272, 43 Am. Dec. 740, present unconstitutional attempts to withdraw from constitutional officers portions of their powers and to confer the same on others. It will thus be observed that the courts have indicated a reasonably close discrimination in recognizing

as a newly created local officer one who exercised any duties which at the time of the constitution were performed by local officers, and, while it may be that some functions were at the time of the constitution imposed upon then existing town, city or county officers, which were so entirely incidental and casual and so without relation to the characteristics of their respective offices, or, indeed, of local government at all, that, when the legislature might deem it best to relieve such officers of such incidental duties and confer them upon one specially created to exercise them, the latter's office may with propriety be held to be newly created, yet the line of demarcation between such a situation and that condemned by the various authorities has not as yet been drawn, and will require much nicety of discrimination in its location."

In the light of the foregoing rule, we ask, can it be said that the duties of sheriffs, with reference to the enforcement of the criminal statutes of the state at the time of the adoption of our constitution, were merely incidental and casual, and without relation to the characteristics of their respective offices? If so, it is possible that the legislative assembly could take away such duties and confer them upon an officer to be appointed by central authority. We think it clear that these duties were not merely incidental to such office, but, on the contrary, they have from time immemorial been inseparably connected with, and in fact have constituted, the paramount functions of such office. The Wisconsin court, in the recent decision above cited, after quoting from the Draper case in 15 N. Y., and citing the later New York decisions, further says: "We can see no reason to disagree with the views thus expressed, at least as to such functions as are obviously not essential to the existence of counties, cities, villages and towns, or to their efficiency to accomplish those purposes for which the constitution employs them, or such powers as are not essentially characteristic of specific local officers named in the constitution and by it required to exist and persist." The court then goes on to show that at the time the constitution of Wisconsin was adopted the function of drawing jurors did not belong to any particular county officer, and was merely incidental to the duties of certain county officers, and it reaches the conclusion that for this reason the legislature is at liberty to impose the duty upon newly created officers to be appointed by the circuit judges. We think the opinion fully sustains the respondent's contention in the case at bar.

A somewhat analogous question was before the Supreme Court of Mississippi in *Fant v. Gibbs*, 54 Miss. 396. Thirteen district attorneys had been elected in as many judicial districts of the state, and subsequently the judicial districts were reduced to 11, and the legislature sought to confer upon the governor the power to assign the district attorneys to the respective districts. There being but eleven districts, it was provided that the governor should assign to each judicial district one of the several district attorneys theretofore elected, and in making such assignments the act provided that district attorneys shall be assigned to the respective districts in which they may reside, and that the salary of each who is not assigned by the governor shall be fixed at \$100 per annum, the salary prior thereto having been \$1,200 per annum. The court, in holding the law unconstitutional, among other things, said: "The proposition that the legislature cannot, directly or indirectly, remove the incumbent of an office created by the constitution during the term fixed by that instrument, needs no argument nor elucidation. If not originally self-evident, it has, by a long and unbroken series of decisions, become firmly settled. * * * But the fundamental principle which prohibits the removal by legislation of a constitutional officer during the constitutional term is that the framers of the organic law, by creating the office and specifying the term, have unmistakably indicated their will, first, that the state shall always have such an officer, and, secondly, that the duration of the term of each incumbent shall depend not on the legislative will, but on the solid basis of an ordinance that cannot be changed save by a change in the constitution itself. * * * The correctness of these views will not be questioned where only one officer of a class is prescribed by the constitution, as in the case of the governor or attorney general; nor where a fixed number is established, as is the case of the judges of this court and the supervisors of the several counties. But it is suggested that where the constitution merely directs that a suitable or competent number of a designated class of officers shall be elected or appointed, and leaves that number to be determined by the legislature, the power to establish carries with it the power to change; that, therefore, even though a fixed term is prescribed, each legislature must judge of the number needed by the state, and that the judgment of one legislature on this question cannot bind a succeeding one. * * *. It is therefore insisted that whether all the incumbents shall remain in

office during the full constitutional term for which they were chosen must depend on whether the legislature deems that the state so long requires the services of the entire number. This view we deem wholly untenable, because utterly subversive of the end intended to be accomplished by the constitutional specification of terms." The relator, Fant, was one of the district attorneys unassigned, and he applied for a writ of mandamus to compel the state auditor to issue a warrant for his salary on the basis of \$100 per month. Under the act in question he was authorized to perform his duties in his district only when the district attorney who was assigned thereto was absent. The court further said, in speaking of the power of the legislature to curtail his duties: "Every inch of territory where he could do any and all duty incident by law to the office to which he was elected is taken from him, and another person, under this statute, has been designated by the governor to fill the office in that territory and do all things incident to it. That person, by the assignment of the governor, is as fully and completely district attorney of Marshall county, the place of Fant's residence, as in any other county of the district. It is as thoroughly and completely his right and duty under the statute to do any and all things pertaining to the office in Marshall county as anywhere else in the district. Unless the right, in the absence of the assigned district attorney, to perform all the duties of district attorney during the terms of the circuit court of Marshall county leaves Fant invested with all the constitutional rights, privileges and duties, within the meaning and intendment of the constitution, of the office of a district attorney, then he is not left by this act charged with the office such as the constitution means. Plainly it was his duty, under the general law, to represent the state in all prosecutions or infractions of the penal laws; to institute, prosecute and defend all civil suits in which the state or a county was interested or a party. * * * The single privilege left to him is to perform all the duties of district attorney during the term of the circuit court of Marshall county during the absence of the assigned attorney. If the assigned attorney is absent on the first day of the term, Fant may act. But if the assigned attorney is present on the second day, Fant's occupation is gone. * * * He is only district attorney contingently." The court held that the act in question amounted to an indirect ouster of Fant from his office as district attorney. "While the legislature carefully refrains

from declaring outright that he shall no longer be district attorney, it accomplishes the same result by indirection; it takes from him a district and deprives him of a right to perform functions, except in an improbable and remote contingency. * * * Certainly that reading of the constitution is wholly inadmissible which subjects the right of a constitutional officer to the enjoyment of his office and the discharge of its functions to the whim, caprice or accidents that may actuate or befall some other individual."

The foregoing language is quite applicable to the case at bar. Under the act in question, as before stated, the legislative assembly have attempted to confer upon the enforcement commissioner the power, whenever he deems it necessary, to displace the sheriff and state's attorney in the discharge of important functions or duties connected with their offices. The enforcement commissioner might find it necessary, in his opinion, to displace these officers by deputy commissioners and special sheriffs in every county of the state, not only temporarily but permanently. The constitutionality of the act must be tested by what it is possible to do under its provisions, and not what it is probable may be done. Furthermore, as before stated, a law which displaces these officers by appointive officials during a portion of the time is no less open to this constitutional objection than it would be if it provided for their permanent displacement in such manner.

In the case of *People v. Keeler*, 29 Hun. 175, the Supreme Court of New York, in a well-considered opinion relative to the constitutionality of a statute of that state passed in 1882 transferring to the superintendent of the Albany county penitentiary certain functions theretofore exercised by the sheriff, had this to say: "It is claimed by the respondent that the statute is a violation of article 10, section 1, of the constitution, which provides that sheriffs shall be chosen by the electors of their respective counties; and the argument of the respondent is that the statute takes from the sheriff of Albany county and gives the superintendent of the penitentiary (an officer that is not elected) powers and duties which cannot thus be taken away. On the part of the relator, as we understand, it is not disputed that a law which should take away all or practically all the powers and duties of a sheriff and should give them to some officer not elected by the people would be a violation of the constitution, even though it should permit the people to elect an officer who should have the name of

sheriff, though stripped of all power and duty. And we think this must be so. The constitution does not permit the legislature to evade its provisions by taking away the powers and duties of an officer made elective by that instrument and giving them to some appointee, leaving the people the poor privilege of electing an officer who is such only in name. On the other hand, it is admitted by the respondent that to some extent the legislature may modify and regulate the duties which sheriffs are or were to perform. Perhaps the legislature might even abolish the duties and powers or some of them, altogether, as obsolete and no longer needed. But the question here presented is not one of abolishing, but of transferring, powers and duties. It was even said on the argument that the legislature might require the punishment of convicts to be by confinement in penitentiaries instead of county jails, although the latter are, and the former are not, under the control of the sheriff. That would be a part of the punishment of crime as to which the sheriff's duties might be considered to be incidental. The question then to determine is whether the present statute is a mere regulation of the sheriff's duties and powers, permissible under the constitution, or whether it so transfers his duties and powers to an appointed officer as to infringe the meaning of that instrument." The court then considers the effect of the statute in question, and holds that it makes the Albany county penitentiary the county jail of the county and its superintendent the jailer; it takes away the power of the sheriff to appoint a jailer, and gives the superintendent the custody and control of all prisoners confined therein, as the sheriff would have had if the law had not been enacted, taking away from the sheriff the custody of all persons arrested under civil or criminal process, and transferring the same to the superintendent of the penitentiary. The only authority left to the sheriff in regard to prisoners is to direct the superintendent to convey them to and from said jail. The court then says: "The question, then, is whether the custody and control of the prisoners arrested under civil and criminal process is such a part of the sheriff's office, as it existed at and before the adoption of the constitution, that such control cannot be taken from him and given to an officer not elected by the people without a violation of that instrument. * * * It has been the duty of the sheriff to arrest and confine all persons charged with crime, and to execute the process of the higher courts; and to discharge this duty

he may summon the power of the county. A power so great, the constitution provided should be intrusted only to an officer chosen by the people, thus returning to the old principles of English law (1 Bl. Com. 339); and those who framed that instrument may well have feared to give that power over the persons of citizens to any one not chosen by them."

Applying the foregoing language to the case at bar, can it be said that the special enforcement sheriffs, who, under the act in question, are expressly clothed with "all the common law and statutory powers of sheriffs in their respective counties," may, in the enforcement of the criminal statute by this act committed to their charge, summon the power of the county to their aid? Did the framers of the constitution intend to delegate such power to officers appointed by central authority? If so, why were they so careful to provide for the election by the people of the officer who from time immemorial had been vested with such authority?

The Supreme Court of New York in the foregoing case makes use of the following very apt and significant language, which, we think, is a complete answer to some of the arguments presented by the petitioner in the case at bar: "It is not necessary to say that the legislature cannot abolish some, or perhaps all, of the duties of the sheriff. For instance, the legislature might abolish all imprisonment in civil cases, as well as in cases in tort as on contract, and such legislation would destroy a part of the present duties of the sheriff. But the question, as above remarked, is not whether the legislature can abolish, but whether it can retain, those powers and duties, and give them to an officer not elected. Upon this point the case of *Warren v. People*, 2 Denio (N. Y.) 272, 43 Am. Dec. 740, seems to be conclusive, and the reasoning therein is sound. It may be difficult to draw the line in regard to numerous instances which are suggested by the relator's counsel, of taking away from sheriffs certain special duties and giving them to an appointed officer, and to say, as to each, whether it would be a violation of the constitution, or only a permissible modification of the sheriff's duties. If any general rule could be laid down, it would probably be that the common-law powers and duties pertaining to the office of sheriff could not be transferred to an appointed officer, whatever might be done as to powers and duties of another character." For the general rule upon the subject the court cites *People v. Albertson*, 55 N. Y. 51, and *People v. Ray-*

mond, 37 N. Y. 428, and in applying the rule to the facts before the court it was held that, under the doctrine announced in those cases, there can be no doubt that the custody of the jail and of the prisoners confined therein is one of those powers and duties which by common law belonged to the sheriff and which continued to belong to him at the time of the adoption of the constitution. And it was distinctly held that the framers of the constitution, in declaring that the sheriff should be elected, must have intended an officer who, among other things, should possess that custody, and that if it is possible to transfer to an appointive officer such power, then other powers in like manner may be transferred to other officers, the result being that the sheriff may be deprived of every power and duty which the common law gave him. The court held that the statute in question was unconstitutional in so far as it attempted to transfer the custody of the jail and of the prisoners from the sheriff to the superintendent of the penitentiary. The decision was rendered by a united court, and we have no doubt of the soundness of the rule therein enunciated.

The Supreme Court of New York, in *re Brenner*, 66 App. Div. 375, 73 N. Y. Supp. 689, which decision was affirmed by the Court of Appeals of New York in 170 N. Y. 185, 63 N. E. 133, after commenting upon the prior decisions in that state upon the home-rule provisions of their constitution, said: "From these and other authorities which might be cited, it must be regarded as well settled that the purpose of the constitutional provision in question is to secure to localities the fundamental right of self-government; that it protects all official duties existing at the time of its adoption, vested in local officers, and inhibits the transference of such duties to officers not elected by the electors of the locality or appointed by local authority; that it is not the officer, but the office, the existing duties and functions, to which the protection is extended, and which cannot be transferred to an officer elected or appointed other than in the prescribed manner. Nor can this be done by any change of name or colorable change of duties. Under this construction, it becomes necessary to ascertain the duties of the office in question, and whether substantially the same duties were performed by any officer at the time of the adoption of the constitution, and the particular officer on whom the same were devolved." The court held that the act in question, which attempted to transfer functions theretofore belonging to a county officer to an officer appointed

by central authority, was unconstitutional and void as being in violation of the home-rule provisions of the constitution of that state, which are substantially the same as the provisions of the constitution of this state upon that subject.

King v. Hunter, 65 N. C. 603, 6 Am. Rep. 754, is a very instructive case. There the legislature undertook to take away a portion of the duties of sheriffs, to wit, the collection of taxes, and vest such duties in a newly created officer known as "tax collector." One ground of the decision is that the act is unconstitutional for the reason that it impairs the obligation of the contract between the people and the sheriffs. The decision can have no weight as an authority upon this point outside of the state of North Carolina, which is the only state holding that an office creates a contract; but the second ground of the decision we think clearly sound, the court holding that the act in question is liable "to the more serious objection that it breaks faith with the people, by taking from them the right to choose the officer who may go into every man's house and distrain his property, or otherwise collect the taxes. Probably there is no right of which the people are more jealous, and for the infringement of which they will hold the legislature and the courts to a more rigid accountability. If the people may be deprived of the election of this officer, and if his duties and emoluments may be transferred to an appointee of an irresponsible body, of what other similar right may they not be deprived? With as much propriety every other office in the state may be cut up, and those who have been put into the office by the people may be starved out, and irresponsible persons put in. The people have secured to themselves the selection of governor because they would have the important interests of the state committed to an agent of their own choice. With as much propriety the duties with which he has been intrusted might be transferred to others, irresponsible to the people; and so with every other officer in the state." In addition to the foregoing authorities, we call attention to *People v. Bollam*, 182 Ill. 528, 54 N. E. 1032; *State v. Barker*, 116 Iowa, 96, 89 N. W. 204, 57 L. R. A. 244, 93 Am. St. Rep. 222; *State v. Arrington*, 18 Nev. 412, 4 Pac. 735; *Mechem on Pub. Officers*, section 467: "Where a state constitution provides for the election of sheriffs and fixes the term of office, though it does not define what powers, rights and duties shall attach or belong to the office, the legislature has no power

to take from a sheriff a part of the duties and functions usually appertaining to the office, and transfer it to an officer appointed in a different manner and holding the office by a different tenure." See, also, Black's Const. Law, p. 373; Throop on Pub. Officers, page 19.

The argument of petitioner that the functions of these newly created officers are state functions and not local, and that therefore the legislature, under the police power of the state, had a constitutional right to pass the act in question, is fully answered by the foregoing authorities, and especially by Mr. Eaton in his article heretofore referred to. In 14 Harvard Law Review, p. 128, he states: "It will be noticed that many of the cases cited involved the question of the validity of the appointment of police commissioners by the governor for certain cities. It will be claimed that, even admitting the right to local self-government, police officers are doing a state duty, and therefore, being state officers and not town or city officers, the state has the right to appoint them. Therefore, it is claimed, the legislature, in authorizing the governor to appoint a board of police for a city, is not interfering with the right to local self-government. To this argument there is more than one reply. It is not denied that the legislature can appoint state police. It is claimed, however, that when it does so it must pay them with state money. * * * But, apart from this objection, there is no agreement among the authorities that police officers are state and not local officers. The following cases hold that they are state officers: *People v. Draper*, 15 N. Y. 344, at pages 362 and 373; *Mayor, etc., of Baltimore v. Howard*, 15 Md. 376; *Cobb v. City of Portland*, 55 Me. 381, 74 Am. Dec. 572; *People v. Hurlbut*, 24 Mich. 81-83, 9 Am. Rep. 103; *Chicago v. Wright*, 69 Ill. 326; *Burch v. Hardwicke*, 30 Grat. (Va.) 24, 32 Am. Rep. 640; *State v. Hunter*, 38 Kan. 581, 17 Pac. 177; *Commonwealth v. Plaisted*, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566; and lastly *Kelley, Adm'r v. Cook* 21 R. I. 29, 41 Atl. 571 (a case in which this point was conceded by the plaintiff and no authorities cited. It is at variance with the history of the subject in Rhode Island as has been shown in these articles, and may yet return to plague its inventors. * * *). The following cases hold that they are not state officers: *Speed & Worthington v. Crawford*, 3 Metc. (Ky.) 210; *Allor v. Wayne County*, 43 Mich. 76, 4 N. W. 492 (a thoroughly well-considered case, in which the

brief for the relator is of great interest, and contributed materially to the decision reached); *City of Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; *State v. Moores*, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624. * * * With such confusion and conflict of view among the authorities, it is impossible to rest the right of the legislature to interfere in local self-administration of police powers upon the ground that it is the exercise of a state power and not of a town power. * * * It will be noticed that the later cases sustain the principles sought to be brought out in these papers, and are entitled to more weight than the many cases to the contrary that are largely obiter dicta. They are also later in date, and it is confidently submitted, are the better statement of the law of today."

It will be seen from an examination of the numerous authorities that the doctrine of local self-government, as generally understood, rests upon implied restrictions found in the various constitutions, and most of the cases, as will be noticed, involve the implied rights of municipalities in this respect. Here we are dealing with express constitutional limitations upon the legislative power, and this distinction must be kept in mind. But petitioner argues that under section 217 of our constitution, being article 20, which prohibits the manufacture and sale of intoxicating liquors in this state, the legislative assembly is given express authority to enact any law looking to the enforcement of that section. This contention is based upon the following language contained in said article: "The legislative assembly shall by law prescribe regulations for the enforcement of the provisions of this article and shall thereby provide suitable penalties for the violation thereof." It seems to us a strange and wholly unwarranted construction of the foregoing language to say that the framers of the constitution intended thereby to give the legislative assembly an absolutely free hand in prescribing such regulations and penalties. We think article 20 must be construed in connection with and in the light of the other provisions of that instrument, and when thus construed it is apparent that all that was intended by the use of this language was that the legislative assembly shall prescribe such regulations, etc., not inconsistent with the other provisions of the constitution. To say that under the power to prescribe regulations the legislative assembly may create new offices in contravention of the whole scheme

of government provided for by other provisions of the constitution is, we think, doing unwarranted violence to the obvious intent of the framers of that instrument.

Entertaining the views herein expressed, we are compelled to hold the act in question unconstitutional and void. The application for the writ is accordingly denied.

MORGAN, C. J., concurs.

SPALDING, J. (dissenting.) The principles announced in the opinion of my associates in this case seem to me so at variance with those underlying the formation of society into the organization known as "the state" that I am unable to give them my assent. If I understand their opinion correctly, it holds: First, that the election of sheriffs and state's attorneys, being provided for in the constitution, none of the duties pertaining to those offices under the law, at the time the constitution was adopted, can be taken from them, and conferred upon any other officer appointed by authority of the legislature; and, second, for the reason that the constitution has provided for the election of sheriffs and state's attorneys by counties, it must be implied that the people of the state, in adopting the constitution intended to establish the principle of what is commonly known as "home rule," or local self-government, and that they thereby turned over or delegated to counties the absolute right to the control of all matters relating to the enforcement of the criminal statutes of the state, and in practical effect relinquished their right to determine how or in what manner the duties of such officers shall be performed, or whether they shall be performed at all.

The courts of several of the states with constitutional provisions on this subject practically like our own have repudiated in toto the doctrine of home rule; but in considering this case, I shall not base my conclusions upon the reasoning of the courts of this class of states, but shall assume, though it may be a debatable question, that this principle is recognized by our constitution, and that its proper application should be protected by the courts. I, however, cannot assent to the terms and methods of its application used by my brethren. I am strongly impressed with the opinion that they have been led into error by an earnest, and from their viewpoint a laudable, desire to recognize in this new state the right of local self-government, so called, in its different coun-

ties and municipalities. After long and careful consideration of the vast array of authorities, on one phase and another of these principles, it is clear to me that they have extended this doctrine far beyond any point to which it is carried by any other court of this country, and where, if put into practical operation and effect in all the counties, it might deprive the state of the right and power to enforce the laws of its own making for the protection of life, liberty and property, as guaranteed by the constitution, and would almost completely nullify the powers of the state as an organization. I am convinced that the majority opinion overlooks or fails to give due weight to several important principles, namely: (1) The purposes and objects sought to be attained by the organization of society into the political entity and system known as "the state." (2) It fails to take into consideration the relation which the county or municipality bears to the state, and the relation which county officers hold to the county and to the state. (3) It fails to distinguish between officers whose duties are to the state, and those whose duties are to the county or municipality, and likewise between the duties which one officer owes to the state and those duties which he owes to the municipality. (4) It fails to give due weight to article 20 of the constitution. (5) It is unsupported by authorities, the principle of local self-government, where upheld by the courts, being uniformly in conflict with its application, as made by the majority opinion.

Before proceeding with a discussion of the principles applicable to the law in question, I desire to call a little more definite attention to some of its provisions than has been done in the majority opinion, and also to some contemporaneous history, serving as the inducement to the legislature to enact this statute. Section 1 of chapter 187, page 303 of the Laws of 1907, provides for the appointment of a commissioner by the governor; for his compensation and expenses etc. Section 2 prescribes his qualification, and that with the advice and under the direction of the governor, he shall have and is authorized to exercise in any part of the state certain duties. Section 3 provides for the appointment of a deputy and his powers. Section 4, for the appointment of enforcement sheriffs in such number as in the judgment of the commissioner may be necessary, giving them the powers of sheriffs in their respective counties, in the enforcement of the law against the manufacture and sale of intoxicating liquors. Sections 5, 6 and 7

have no bearing upon this matter. Section 8 requires that the enforcement commissioner, upon being satisfied that the local authorities fail to enforce the law referred to in any county, city, village or town, shall, subject to the limitations of section 2 (i. e., with the advice and under the direction of the governor), with the aid, assistance and co-operation of his deputy and one or more of the enforcement sheriffs, enforce such law. Section 9 provides that nothing in the act shall in any way relieve sheriffs or municipal officers of cities, towns or villages, or the state's attorneys of any county of the duties devolving upon them under the prohibition law. Other sections make it the duty of the governor to remove the commissioner from office whenever in the judgment of the governor he is no longer a necessity. In the latter case, the office is suspended until the governor again deems the services of a commissioner required. Courts take judicial notice of contemporaneous history which led up to and induced the enactment of a law. Rev. Codes 1905, section 7319. *Bailey v. State*, 163 Ind. 165, 71 N. E. 655.

The territory of Dakota was under various laws relating to the traffic in intoxicating liquors. It had both high and low license laws, and in 1887 the legislature enacted a county local option law, under which some of the counties in the present state of North Dakota voted to prohibit the traffic, and others to license it. The experience of the people with the subject evidently convinced them that this traffic was the cause of much of the poverty which existed, of a very large percentage of the crime, and was a great burden on the taxpayers of the state, as well as highly detrimental to the morals of any community tolerating the traffic. It was also deemed to be a fruitful source of corruption in politics. The voters of a large number of the various districts which elected delegates to the convention which framed the constitution of the new state in 1889 instructed their candidates to vote for constitutional prohibition of the manufacture and sale of intoxicants. Accordingly the convention framed article 20 of our constitution, which provides "No person, association or corporation shall within this state, manufacture for sale or gift, any intoxicating liquors, and no person, association or corporation shall import any of the same for sale or gift, or keep or sell or offer the same for sale, or gift, barter or trade as a beverage. The legislative assembly shall by law prescribe regulations for the enforcement of the provisions

of this article, and shall thereby provide suitable penalties for the violation thereof;" and to enable the people to vote upon this article intelligently, and independently of any other part it was submitted to a vote separately and apart from the remainder of the constitution.. No voter was required, and it was not even possible, to vote for any other provisions of the constitution, or for the constitution as a whole, either for the purpose of securing the adoption of constitutional prohibition or to insure its rejection. The first state legislature which convened obeyed the terms of article 20, and enacted a law prescribing regulations for its enforcement. While this law has generally been well enforced, in a few counties little if any effort had, up to the beginning of the year 1907, been made either to obey the law or to secure its enforcement. It was understood that public sentiment in these few counties was against the law and against its enforcement, and that the voters of such counties deliberately elected state's attorneys and sheriffs known to be opposed to its enforcement, and oftentimes those who pledged the voters that they would take no steps to secure it. It was well understood that no candidate for either of these offices in such counties who was understood to favor the enforcement of law could be elected. The conditions which existed in such counties rendered them and the state the objects of ridicule by all classes of people. The business as conducted in some such counties became the fruitful source of graft and corruption. Cities, under the guise of licensing poolrooms and other places of resort, exacted contributions from the proprietors, as dealers in intoxicating liquors, for permission to carry on the unlawful traffic. County officers were believed to be participants in the revenue derived from the exactions made of those who were permitted to treat with impunity the law and constitution of the state. These conditions and the odium attached to the state by reason of their existence, as well as the growing sentiment among the people and lawmakers that the traffic was an unnecessary evil, and in conflict with the best interests of the state, and detrimental to the welfare of its people, led the legislature of 1907 to enact the law in question, with a view to making the operation of the so-called "Prohibition Law" uniform in all parts of the state, and of securing obedience to its provisions.

My opinion on the constitutionality of the law, however, is to no considerable extent based upon its having any relation to consti-

tutional or statutory prohibition. The principles involved are far wider reaching, and of far greater moment as applied to the general subject of the powers of the state to enact and enforce police regulations applicable to the whole state, and to provide the means by way of state officers to secure the enforcement of criminal statutes, than anything applying simply to the traffic in intoxicants. However, as I shall show later in treating of article 20 of the constitution, that article in my judgment furnishes reasons, in addition to those general reasons applicable to the general police power and the sovereignty of the state, why the law attacked in this proceeding is constitutional.

The people in the formation of the state, by a compact between themselves for the purpose of protecting life, liberty and property, and the reputation of its inhabitants and of all the people within its borders, and as a guaranty to their inalienable right to pursue and obtain happiness, delegated to the legislative assembly the power to enact laws not expressly or by necessary implication prohibited by the constitution. This state was not formed by a union of pre-existing local or other governments or bodies of people. The state was made the supreme organization; counties, cities, towns and other political or municipal subdivisions are the mere creatures of the state.

The majority opinion places great stress upon the article of that eminent attorney, Mr. Amasa M. Eaton, published in the Harvard Law Review. While I shall call further attention to them, it is sufficient to say here that he had been employed to attack a law of the state of Rhode Island authorizing the governor to appoint a commission which should have the appointment of police officers for the city of Newport, control and remove them, and to make rules and regulations to govern them, and he did so upon the ground that it was an invasion of the doctrine of home rule or local self-government, and based his contention upon the historic development of the town governments of Rhode Island and of other New England states, which is entirely unlike that of the county in this state. He contended that because the state of Rhode Island had been formed by a union of four colonies or towns which each contained and maintained all the machinery incidental to government and sovereignty in itself for many years prior to the union, and because the state conducted all its affairs until 1842 without a constitution, that each of the towns or municipalities

existing within the state now retains every element of local self-government possessed by it prior to their union into a state. The case referred to was pending in the Supreme Court of Rhode Island when most of the articles were published. It takes no mental effort to see that there was far stronger reason for the application of the doctrine as contended for by him in that state than exists in North Dakota. He made an exceedingly strong and learned presentation of his views on the subject, and while they may furnish authority for this state, as they appear to do, they were not considered as the correct exposition of the law by the highest court of his own state, which held against him on all propositions, and its opinion has become a leading authority on the subject. It is found in 22 R. I. 196, 47 Atl. 312, 50 L. R. A. 330, *City of Newport v. Horton*, and is followed in the later case of *Horton v. Newport*, 27 R. I. 283, 61 Atl. 759, 1 L. R. A. (N. S.) 512. Evidently for his own satisfaction he determined to have his views printed, but in so doing he repeatedly recognized, and his argument to a considerable extent is built upon the fact, that there is a distinction between the right to local self-government in Rhode Island and the New England states and the states of the west and south, where he concedes the doctrine has far less force than in Rhode Island. If we are to destroy the sovereignty of the state, which follows the application made by the majority in this case of the principles of home rule, we do it by making the county or municipality sovereign, and instead of one sovereignty we have many, each with a power to nullify within its own borders the laws enacted by the legislative assembly for the preservation of the inalienable rights of the people and their protection in exercising them, and there is no power provided which can prevent all manner of oppression, or admit of the state performing the functions for which it was organized. To me it is perfectly clear that the state is and must be sovereign—that is, the people as represented by the state government are and must be sovereign—and that a division of the state into hundreds of minor and petty sovereignties, which is the effect of this decision, was not contemplated in the adoption of the constitutional provisions relied upon. It cannot be that it was the intention to give to the officials of any locality the irrevocable right to say whether the laws enacted by the people of the state shall be obeyed or trampled under foot as the caprice or the personal interests of its residents may dictate. The ap-

plication of the principle made means that life, liberty and property and the other inalienable rights of the people may be placed in jeopardy in any locality at the will of the inhabitants of such locality; that the laws of the state, while in terms of uniform application, are not so in fact, but may be defied at will by any community, and that a part is greater and more potent than the whole. This is not an assertion of the principle of home rule or local self-government, but is the assertion of a principle, the application of which can only be destructive of all government by the state.

Prof. Burgess, in his work on Political Science and Comparative Constitutional Law, in speaking of the ends of the state, on page 36 of volume 1, says "First of all, the state must establish a reign of peace and of law, and it must establish a government, and vest it with sufficient power to defend the state against external attack and internal disorder. This is the first step out of barbarism, and, until it shall have been taken, every other consideration must remain in abeyance. If it be necessary that the whole power of the state be exercised by the government in order to secure this result, there should be no hesitation in authorizing or approving it. The highest duty of the state is to preserve its own healthful growth and development." How can its own healthful growth and its existence and development be preserved if the voters of a locality can at any moment set at defiance the laws of the state by an intentional election of officers, whose known purpose and design is to nullify and defy the laws constitutionally enacted by the legislative assembly, and the state retain no power to enforce its own laws? The application of the doctrine of home rule sought and made in this proceeding is but a reassertion, in a new form with local application, of the South Carolina doctrine of nullification. The majority of the people of that state, as will be remembered, in 1832 asserted the right within its borders to nullify a law of congress in terms of uniform and universal application throughout the Union. The chief executive of the nation, a man learned in the law, who had served six years as judge of the highest court of Tennessee, answered the ordinance written by Mr. Calhoun, adopted by South Carolina, and the doctrine it contained, which Mr. Calhoun preferred not to call nullification, but rather a "suspensive veto" of the laws of congress, in a proclamation which has become historic. In this proclamation he says, "The power

to annul a law of the United States is incompatible with the existence of the Union, unauthorized by its spirit, inconsistent with every principle on which it is founded, and destructive of the great objects for which it is founded." These principles may be applied with greater force to the pretended right of the county to nullify within its borders a criminal statute of the state. If the principle is conceded that the county can by electing officers whose legal duty is to prosecute criminals for violation of one criminal statute, but who willfully refuse to do so, nullify the laws of the state, it necessarily follows that all criminal laws may be violated with impunity, and that neither the individual whose rights are infringed or endangered nor the state are possessed of any remedy.

In *State v. Mason*, 153 Mo. 23, 54 S. W. 524, it is said: "The right to establish peace and order is an inherent attribute of government whatever its form, and is coextensive within the geographical limits thereof, touching every part of its territory. From this duty flows a corresponding power to impose upon municipalities of its own creation a police force of its own creation, and compel its support out of the municipal funds. Such is the conceded doctrine by the most learned writers upon constitutional law, and such is the consensus of judicial decision throughout the United States." "It could not be true that the legislature exercising the sovereign power of the state to legislate can create a peace board, and impose upon the city the duty of maintaining it, and yet be powerless if the city sees fit to attempt to thwart the prime purpose of its existence as such." This decision was written in 1898, and refers to the constitution of 1875, and although, when that constitution went into effect, police officers were recognized as existing officers with definite duties, and although the constitution contains provisions identical with section 173 of our own, the Missouri court held that the state could take the appointment of police officers from the city.

Mr. Black, in his work on Constitutional Law, at section 108, says: "There is in every sovereignty an inherent right and plenary power to make all such laws as are necessary to a proper preservation of public security, order, health, morality and justice. This power is called the police power. It is a fundamental power and essential to government, and is based upon the law of overruling necessity. It cannot be surrendered by the legislature, or irrevocably alienated in favor of individuals. * * * It cannot be

doubted that the origin of this power must be sought in the very purposes and framework of organized society. It antedates all laws and may be described as the assumption on which the constitution rests, for the state must have the right of self-protection, and the right to preserve its own existence in safety and prosperity, else it could neither fulfill the law of its being, nor discharge its duty to the individual. To this end it is necessarily vested with power to enact such measures as are necessary to secure its own authority and peace, and to preserve its constituent members in safety, health and morality. It is a power, as has been well said, essential to self-preservation, and exists necessarily in every well-organized community. License Cases, 5 How. (U. S.) 588, (12 L. Ed. 256); Thorpe v. R. & B. R. R., 27 Vt. 140, 62 Am. Dec. 625, Cooley Const. Lim. 572. For these reasons it appears that the nature and authority of the police power is best described by the maxim, 'Salus populi, suprema lex.' * * * It has always been held that the police power is an inalienable attribute of sovereignty, and therefore can never be curtailed or diminished; that it is present in every act of the legislature, and that no legislature can either sell or surrender it, destroy or hamper the power of its successors to make such enactments as they may deem proper in matter of public police. * * * The exercise by the state at any time of its right to legislate for the protection and good government of the community can never be construed into a violation of the prohibition in question, notwithstanding its effect may be to repeal existing charters or otherwise invade the terms of legislative engagements. Stone v. Miss., 101 U. S. 814, 25 L. Ed. 1079; Boyd v. Ala., 94 U. S. 645, 24 L. Ed. 302; Slaughterhouse Co. v. Live Stock Landing Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585." And in section 109 he says "The police power extends to the making of laws which are necessary for the preservation of the state itself, and to secure the uninterrupted discharge of its legitimate functions, and for the prevention and punishment of crime, and for the preservation of the public peace and order, and for the protection of all members of the state in the enjoyment of their just rights against fraud and oppression." And he continues in section 110: "Under the American system of government, plenary authority to make police regulations is vested in the legislatures of the different states, restricted only by the paramount authority of positive constitutional prohibitions. * * * It is vested in a subordinate and delegated man-

ner in the authorities of municipal corporations. It must be observed that there is not a distinct police power inherent in municipal corporations, other than that of the state to which they owe their existence. * * * Of course, the police power delegated to a municipal corporation is not exclusive of that retained by the state. That is, municipal police regulations must yield to the general laws of the state whenever there is a conflict between them." Yet it follows from the application of the principle of home rule made in the case at bar, that municipalities may enact and enforce ordinances and by-laws in conflict with, and which take precedence over, the laws of the state.

"Subject to the paramount power of the national government, each state, under our constitutional system, is supreme and sovereign throughout its own borders—as well within cities and villages, as with rural counties, towns and school divisions. No one of these divisions, as a rule, has any political rights or authority save that which the state concedes and recognizes. Within all parts of its jurisdiction there is both an authority and a duty on the part of every state—and also an obligation on the part of all its citizens—to take care that the enforcement of its constitution and laws are such as will most contribute to the welfare of the whole people of the state, without discriminating locally in favor of any portion of them at the cost of others, whether they reside in cities, villages or towns. For the state to neglect its duty, or to surrender such authority, would be treason to itself and disastrous to the well-being of the people." Dorman B. Eaton, *Government of Municipalities*.

The preservation of the peace has always been regarded both in England and America as one of the most important prerogatives of the state. It is not the peace of the city or county, but the peace of the king or state, that is violated by crimes and disorders. The prosecution is on behalf of the state. *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103.

Cooley defines a state as a body politic, or a society of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength. Several authorities define it as a self-sufficient body of persons united together in one community for the defense of their rights, and for other purposes. In this sense the state means the whole people united together in one body politic. Another writer defines, as

among the attributes of a state: It must be an organization of people for political ends. It must permanently occupy a fixed territory. It must possess an organized government capable of making and enforcing law within the community; and says, "A community cannot be considered a state if their government is permanently incapable of enforcing its own laws." It appears from the above definitions that, when the state ceases to be able to protect its citizenship and enforce its laws, it is no longer entitled to be considered a state. It may be answered that this is not the effect of the decision, because the attorney general may perform the functions of the state's attorney where the latter officer fails or refuses to perform his official duties as a prosecutor. But under the law as it existed when we became a state, this was no part of the official duties of the attorney general, unless requested by the governor or the legislature to act in a designated case; and to adopt the theory of the respondent in this case, any change in the law adding this duty to those of that office when the constitution was adopted takes away from the state's attorneys duties which are theirs under the constitution, and is therefore invalid.

It is again answered that the remedy lies in the removal of officers who fail to perform their sworn duties. This answer is clearly weak. With public sentiment against the enforcement of criminal law in a county, so no officer can be elected who will enforce the law, but only such as are known to oppose its enforcement, how can a jury be obtained or proceedings maintained to punish an officer for failing to do things which he pledged the people he would refrain from doing, and who in case of removal would appoint others like him? And again, if the officer have a sacred inheritance in the duties incumbent upon the office when the state was organized and the people of the county the sole right to name him, no power of removal can exist except on the part of the very people who elected him. It cannot be asserted that in practical operation there is any method of removal except by failure to re-elect on the expiration of the term of office. What is a county, and what is its relation in the enforcement of state laws, to the state as a whole? Prof. Fairlie, in his work on *Local Government in Counties, Towns and Villages*, says "A county is one of the civil divisions of the state or territory for judicial and political purposes, and at the same time a district of quasi corporate character for purposes of local civil administration. By constitution or statute,

counties are usually created bodies politic or corporate. This has been said to mean that they have both political and business functions, and the two terms at least mark an important legal distinction in their powers and duties. As corporations their powers are limited, and less than those of a full municipal corporation. They may bring suits, and be sued, and make contracts for authorized purposes, and they may acquire and hold real estate and personal property, but these powers are for the most part incidental and secondary to the governmental functions of counties. The latter are so prominent that it has been said in a judicial opinion that counties exist only for the purposes of the general political government of the state. They are the agents and instrumentalities the state uses to perform its functions. All the powers with which they are intrusted are the powers of the state, and the duties imposed on them are the duties of the state, and the county organization is created almost exclusively with a view to the policy of the state at large." See *Madden v. Lancaster County*, 65 Fed. 188, 12 C. C. A. 566; *State v. Downs*, 60 Kan. 788, 57 Pac. 962; 11 Cyc. page 341, note 5.

For the distinction between counties and full municipal corporations, see 7 Am. & Eng. Enc. Law, p. 903, and cases cited in note 2. In Alabama this distinction has been very clearly drawn. It is said in *Askew v. Hale County*, 54 Ala. 641, 25 Am. Rep. 730: "It is created mainly for the interest, advantage and convenience of the people residing within its territorial boundaries, and the better to enable the government to extend the protection to which they are entitled, and the more beneficently to exercise over them its powers. All the powers with which the county is entrusted are the powers of the state, and all the duties with which they are charged are the duties of the state. If these were not committed to the county, they must be conferred upon some other governmental agency. The character of these powers, so far as counties in this state are concerned, are all for the purposes of civil and political organization. The levy and collection of taxes, the care of the poor, the supervision and control of roads, bridges, ferries, the compensation of jurors attending the state courts, and the supervision of convicts sentenced to hard labor as punishment for many violations of the criminal law, it is the general policy of the state to intrust to the several counties, and are all but parts of the power and duty of the state. These powers can be withdrawn

by the state, in the exercise of its sovereign will, and other instrumentalities or agencies established and clothed with them." Also see *Town of Montpelier et al. v. Town of East Montpelier*, 29 Vt. 12, 67 Am. Dec. 748.

Black's Constitutional Law, section 132, defining a municipal corporation, says: "Municipal corporations are the administrative agencies established for the local government of towns, cities and counties, or other particular districts. The special powers conferred on them are not vested rights as against the state, nor are they in the nature of contracts, but, being wholly political, they exist only during the will of the legislature. Such powers may at any time be changed, modified, repealed or destroyed by the legislature, saving only the vested rights of the individuals." See, also, Hare's Constitutional Law, section 628.

County officers are but the instrumentalities or agencies through whom the county exercises its functions, both those pertaining to itself as a quasi municipal corporation, and those which it exercises as the agent of the state in the conduct of political affairs and in the execution of state laws. For this reason county officers can have no greater rights in the duties of their respective offices than has the county in the performance of its functions as an instrumentality or agent of the state.

In *Board of Commissioners v. Board of Commissioners*, 92 U. S. 307, 23 L. Ed. 552, Mr. Justice Clifford says: "Public duties are required of counties, as well as of towns, as a part of the machinery of the state, and in order that they may be able to perform these duties they are vested with certain corporate powers, and their functions are of a wholly public nature, and they are at all times as much subject to the will of the legislature as incorporated towns." And again: "Such corporations are the mere creatures of the legislative will. * * * These officers are nothing more than the local agents of the state; their powers may be revoked and enlarged, and their acts may be set aside or confirmed at the pleasure of the paramount authority, so long as private rights are not thereby violated." Fairlie, at page 106, describes a sheriff as a county officer representing the executive power of the state within his county, as the chief conservator of the peace, and as considered in law the agent of the state government, and not as a local officer. He says that as the conservator of the peace in his county the sheriff is the representative of the sovereign power of the state

for that purpose. See Fairlie, *Local Government*, pp. 106-112, and cases cited; Coke (Lit.) 168 (a); Murfree on Sheriffs, section 1160.

A sheriff is a public officer, a mere creature of law created by the sovereign power of the state for public purposes connected with the execution of the law and the administration of justice, as the agent of the body politic, to give effect to its sovereignty and carry into effect its will. His office is a mere civil institution, established for public political purposes, and may be regulated or changed by society. The mere creature of the law, he holds not by contract, and his duties change with the law. He is the mere agent of the public, under a naked authority to perform duties prescribed to him by law, the expression of the public will for the public benefit, and all that can be claimed to be granted to him is the mere authority to be such agent. *State v. Dews*, R. M. Charit. (Ga.) 397.

The prosecuting, or state's attorney as he is designated in this state, is an expansion of the old English office of attorney general. He conducts suits on behalf of the central government. The colonies each had an attorney general, and Connecticut in the early part of the eighteenth century established local assistants to the attorney general, and from this beginning the present system of public prosecuting officers has been established. Their most important duties are connected with criminal prosecutions, which are brought in the name of the state, and the prosecuting attorney in such cases is acting as the agent of the state, and not as a local officer. Fairlie, *Local Government*, p. 104; 23 Am. & Eng. Enc. Law, 275.

From these definitions, I think it may safely be inferred that, in considering the right of the state to modify or change the duties of the sheriff and prosecuting officer, they are to be regarded as the representatives of the state, and it is clear that they are not in this respect local officers, and such duties do not pertain to local self-administration of communities. Regarding the modification or change in their duties, which it is held by this decision are not constitutional, we may at the outset eliminate from our consideration the New York and Wisconsin cases, some of which, although duly recognizing the sovereignty of the state, appear to hold that such duties cannot be changed, for the reason that they are grounded upon the constitutional provisions adopted in New York in 1846,

and copied into the constitution of Wisconsin. This provision is quoted in the majority opinion, but I again quote it: "All county officers"—and here this term is used for identification—"whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties, or appointed by a board of supervisors or other county officers, as the legislature shall direct;" and this is followed by a similar provision as to city, town and village officers. The constitution of this state contains no corresponding provision or requirement. On the contrary, it contains an express command that the legislature "shall prescribe" the duties and compensation of all county, township and district officers. It has been contended that this should not be construed to mean that the legislature can take away from such officers any of the duties known to the office at the time the constitution was adopted. The logic of this contention is that the word "prescribe" can only mean in that connection that the legislature may add to their duties, and not take from them. To me this seems a frivolous contention. The words "shall prescribe," as used in section 173, of course mean prescribe by law; that is, by future enactment of law to fix or establish their duties. If these duties were already fixed unchangeably by the law in force at the time of the adoption of the constitution, then this is a meaningless and idle provision, and leaves the legislature powerless to prescribe them as commanded. It contemplates future action; that is, action by the legislature after the adoption of the constitution. This very principle is passed upon in *Field v. Marye*, 83 Va. 882, 3 S. E. 707, where a section of the constitution was construed which provided that the attorney general should receive such compensation as may be prescribed by law, and it is held that this did not mean settled beforehand, and that the attorney general's salary could be diminished during his term of office. In *Shannon v. Village of Hinsdale*, 180 Ill. 202, 54 N. E. 181, and *Mansfield v. People*, 164 Ill. 611, 45 N. E. 976, it is held that the word "prescribe" means that it "should fix," and this applies to the future. The organic law of Utah as a territory required the judges to hold court at such time and place as may be prescribed by law, and it was held to mean "by law" passed by the territorial legislature, and hence by law enacted after the enactment by congress of the organic law of that territory. And again, the office provided in the law of this state is not a county office, but is a state office provided as a means

to aid the governor in emergencies. My associates have cited and quoted from some opinions which appear on their faces to sustain their decision that these duties cannot be changed or modified. One or two of them may be construed to uphold that doctrine, but most of them on careful analysis appear to me not to do so. It may be conceded that the duties of the county officers, whose offices were established by the constitution, cannot be taken from them in a body and transferred to unconstitutional officers, because to do so would be in effect to abolish the constitutional office. I cannot take the time or space to analyze all the opinions cited by my associates, but think the same purpose will be served by showing what was really decided in a few such cases. Their opinion says "We do not deny the power of the legislature to prescribe duties for these officers, which power carries with it by implication the right to change such duties from time to time as the public welfare may demand, but we do deny its power to strip such officers, even temporarily, of a portion of their inherent functions, and transfer them to an officer appointed by central authority. This, as we view it, is a plain violation of the constitution, and is subversive of the obvious intent of its framers, to reserve to the people of each county the right, to their elected officers, to enforce the criminal laws of the state." This proposition appears to me to beg the whole question by failing to distinguish between the functions of such officers as local officers and as agents of the state or state officers, which I shall later more fully analyze, and to which the authorities relating to self government in municipal corporations most clearly apply. This opinion criticised and adopted the criticism by Mr. Eaton of *People v. Draper*, 15 N. Y. 532, written by Chief Justice Denio, and indicates that it has been overruled by the court of appeals of New York. In that case it was held that an act of the legislature providing for the formation of a police district embracing and combining certain territory which theretofore had had independent systems, and providing for the appointment by the central government of the state, of commissioners having the appointment of all police officers in a district, was constitutional, because the enforcement of the police power of the state was a state function, and that the law in question did not interfere with local self government, because it created a larger district than the existing district. This case has become the leading case on the subject in this country, and, while in the case cited

from (*People v. Albertson*) 55 N. Y., the opinion by Judge Denio is criticised, it was not overruled, and the principle he established has been recognized and accepted as the law in nearly every state in which the question has arisen, and most of the states have held that the state has supreme authority over the police of a district composed of a city without joining additional territory.

But apply the principle to the law attacked in this proceeding. The legislature of this state was providing regulations for the enforcement of the police power of the state, and it made, in effect, a district of the state for that purpose, as it related to the prohibition law, and provided for the appointment of state officers who, under the direction of the governor, who, by the constitution, is charged with the duty of seeing that the laws of the state are executed, are to serve as his aids or agents for that purpose. The principle of the statute is identical with that of the New York law and others, which have from time to time been attacked on the same ground and held valid. *People v. Draper*, decided and recognized in the very latest cases, wherein the courts have passed upon these principles, and notably in these of *People v. Tax Commissioners*, 174 N. Y. 417, 67 N. E. 69, and *State v. Anson* (Wis.) 112 N. W. 475, *infra*.

Great stress is laid upon the case of *People v. Tax Commissioners*, 174 N. Y. 417, 67 N. E. 69, and the opinion in this case says that the court, in upholding the New York law, regarding the taxation of franchises, placed its decision upon the ground that the function of assessing special franchises did not in its nature belong to the county, city, town, or village, but belonged to the state. So I say the function of enforcing the criminal laws of the state, the right to self preservation, is a sovereign function of the state, and never has been delegated to the county, and never can be so delegated by any far fetched implication derived from the terms of the constitution. It is only by the grossest acts of judicial legislation that any such implication can be read into or out of the terms of our constitution, or any such construction placed upon article 173.

In *People v. Tax Commissioners*, *supra*, a law enacted by the legislature of New York, which provided for the appointment by the governor of a tax commission to assess all special franchises, was attacked. That law was aimed specially at the railways, and it made such franchises real property. The function of assessors

had been performed by the constitutional officers, and this law was attacked on the ground that it deprived the constitutional officers of the duties belonging to them. The court, after a labored argument to show its loyalty to the principle of home rule, arrived at a conclusion that the provisions of the law did not violate that principle, because theretofore franchises had not been taxed. It ignored the plain principle that constitutional tax assessors were clothed with authority and duty to tax all property, and that franchises were made real property, and held that, because franchises had not heretofore been taxed, their assessment was not a duty which had devolved on other officers. The doctrine of this case applies most clearly to the law providing for the enforcement commissioner attacked in this proceeding. No prohibition law had ever been in force in Burleigh county prior to the adoption of the constitution. The service of papers and the arrest of violators of such law, and their prosecution, had never been parts of the duties of either the sheriff or state's attorney of that county; and this removes those officers in that county from the rule that the majority of this court lays down as applicable and controlling in this case. My first impression was that this could not be so, but after examining authorities I am satisfied that this principle is applicable to this proceeding, as it has been repeatedly held that, where the law relating to the duties of officers did not apply uniformly to all counties, the validity of an enactment changing the duties of such officers might be affected by the fact as to whether such duties had been incident to the local office. It may be contended that it is not the duties relating to the enforcement of the prohibition law, but those relating to all criminal laws, that belong to those offices when the constitution was adopted, and that this is the test. The logic of this may be tested by inquiring whether, if prohibition rested in this state upon the statute, would a law repealing such statute be constitutional? Could the legislature deprive these officers of the duties imposed upon them to enforce the terms of the prohibition law by repealing such law? The mere asking of this question is its own answer.

State v. Anson (Wis.) 112 N. W. 475, is nearly parallel to the New York case. The legislature of Wisconsin transferred the duties of jury commissioner from the clerk and constitutional officer who had performed them as part of his official duties prior to the adoption of the constitution, to a commissioner appointed by

judges, and it was held that this did not infringe upon the rights of the people, or of the office of clerk, because these duties were only incidental to his office, and more particularly because prior to the enactment of the law attacked there had been no officer known as a "jury commissioner." These two cases simply illustrate as is shown by the argument of the learned judge in the New York case, to what extent courts go in upholding laws passed to meet some new emergency or condition, which, unlike the act involved in this proceeding, appear to conflict with constitutional provisions, and what refinement of construction is resorted to to sustain such laws. No such refinement is necessary in the case before us.

The opinion of my associates states, in connection with the Wisconsin case, that it is apparent that the decision would have been to the contrary had there existed prior to and at the time of the adoption of the constitution county officers charged with the performance of this function, but it is expressly stated in the Wisconsin opinion that that function had devolved upon certain county officers.

In *State v. Hastings*, 11 Wis. 518, the law held invalid provided for an officer whose duty it should be to audit accounts against the state, and whose concurrence was necessary in their approval, before the acts of the constitutional officer should take effect. I think this is in no sense in point. Had the law of that state provided for an officer to aid the governor in executing the laws of the state, and then provided that no acts of the governor of this nature should be valid unless concurred in by this new officer, or that no act of the sheriff or state's attorney should be valid except with the concurrence of the new officer, then there might have been a parallel. Again the court of Wisconsin based its decision somewhat upon the ground that the duties of the auditor were of a judicial nature, and that in such matters the people of the state had a right to the judgment of the officer they had selected for that purpose, rather than that of an officer otherwise named.

State v. Brunst, 26 Wis. 412, 7 Am. Rep. 84, and *People v. Keeler*, 29 Hun. (N. Y.) 175, are not authorities, because the decisions in these cases were expressly stated to be largely upon the ground that the act held invalid deprived the sheriff of the principal part of his duties and emoluments. Then, too, the constitutional provisions of these states heretofore referred to were in force.

z *Warner v. People*, 2 Denio (N. Y.) 272, 43 Am. Dec. 740, cited in the majority opinion, holds that the legislature had not the power to divide the office of clerk of court of common pleas, and create a separate office of clerk of court, dividing the duties, for the reason that the new office was given the largest share, in point of duties and emoluments, and held that the duties taken from the old office were the substance of the office itself, and therefore not pertaining to the right to regulate the duties or emoluments of the office. That case expressly holds that the legislature may regulate or add to or diminish the duties or the fees of a constitutional office, and since its publication has become the leading authority in New York to that effect.

State v. Cunningham, 88 Wis. 81, 57 N. W. 1119, 59 N. W. 503, holds that the constitution having appropriated the proceeds of public lands to the school fund, it is beyond the power of the legislature to divert them to any other use than the support of schools, and that it cannot set them aside for a city park, or withhold the lands from sale, inasmuch as that power was intrusted to the discretion of the commissioners of public lands by the constitution.

State v. Arrington, 18 Nev. 412, 4 Pac. 735, decided that the legislature could not extend the terms of constitutional officers beyond the time for which they were elected, and the remarks contained in that opinion cited as authority for the holding of this court are clearly obiter.

McCabe et al. v. Mazzuchelli, 13 Wis. 534, simply holds that a patent to land executed by the governor and the secretary of state, instead of by a board of commissioners, established by the constitution for the sale of school and university lands, was void and not competent evidence.

In *People v. Squires*, 14 Cal. 13, it was held that it was competent for the legislature to enact laws transferring the duties of assessors and collectors of taxes, which were constitutional offices, to the sheriff. The court says: "We do not see that it would be at all unconstitutional to authorize every taxpayer to pay his taxes directly into the treasury. The law authorizes many acts, such as service of papers, etc., which seem appropriately to belong to the sheriff's office, to be done by parties or private persons. The law might authorize the collection of stamp duties 'by various officers named'; indeed, the whole of the license receipts, where licenses are required, we apprehend, might be made if they are not

now, receivable by other persons than tax collectors. If the legislature could do away with the tax entirely after the qualification of the sheriff, it is difficult to see why they could not change the hands that were to collect it. * * * The duties of the tax collectors are wholly undefined by the constitution, as are their services and compensation. These are left to legislative direction, and we cannot see that an act of the legislature committing this special duty of collecting this license money to particular officers selected by the board of supervisors is a clear violation of the constitution; in which event only could we declare it void."

The constitution may receive interpretation from long, constant, and uniform legislative practice, and where, as in many instances, the legislature exercises the power of appointment to office, unquestioned, this is evidence of a constitutional construction concerning the separate nature of the departmental functions, and an acquiescence by the people and the various departments in such practical interpretation. *Mayor v. State*, 15 Md. 376, 74 Am. Dec. 572.

Apply this principle as an aid to the construction of the enforcement commissioner law. What do we find the legislative construction of the constitution, as evidenced by similar acts, has been in this state? Our legislature has enacted laws providing for game wardens, whose duties include some of those which, prior to statehood, devolved upon sheriffs. They have provided for railway policemen, whose duties likewise infringe on those of sheriffs and police officers. A law changing the duty of executing condemned murderers from sheriffs to the wardens of the penitentiary has been enacted. The same law took the custody of such criminals from the sheriff and placed it with the warden. A state board of health has been provided; a sealer of weights and measures to perform duties which were formerly performed by sheriffs. Laws have been enacted permitting the service of process by private persons. All of these laws come within the ban of the principle of home rule, if properly applied in the majority opinion. But we may go much farther and conclude that, if the duties of the sheriff and state's attorney are as sacred as maintained—that the repeal of law creating crimes is obnoxious to the divine principle of home rule—that any change in any law which in any manner decreases the duties of this officer is equally invalid. On this subject a most instructive opinion is found in *R. M.*

Charlton's Report (Ga.), in the case of *State v. Dews*, *supra*. In that action an act of the legislature of that state, appointing the mayor and aldermen of Savannah commissioners of the jail of Chatham county, and transferring the duties of jailer and custodian from the sheriff, was held constitutional, and that the sheriff is entirely a ministerial officer, whose province is to execute duties prescribed by law; that these duties may be contracted or enlarged at the will of the legislature. The learned judge, who wrote the opinion, goes into the history of the office from the early English days down to date. He says: "The idea that the duties of a ministerial officer cannot be changed would involve an inversion of the order of things, and be a flagrant absurdity. It would invest him, who is a mere minister and servant, with authority to limit the power of and exercise an overmastering control over those from whom he is to receive the law. These duties are the mere creatures of law, and are in their very essence changeable by the lawmaking power. That office he still retains without any interference with the tenure upon which it was conferred upon him, and with it he retains the right to execute the duties which may from time to time be appropriated to it, nor can he be deprived of that right. Those duties which are the mere creatures of law, resulting from the legislative sense of the public interests, are not his private concern, and may be modified, increased, or diminished at the pleasure of those in whom the power of legislation resides. * * * He is entitled to the office, but it is such as the laws of the land make it, and being an institution of government created for public purposes, exercising unalienable political power for the public benefit, it may be altered or modified as the public good, the interest or happiness of the people may require. The act in question does not disturb the tenure by which he holds his office, nor interfere with his right to exercise its functions. It simply changes those functions, and diminishes his duties and powers by relieving him from the duty and power, incidental to that duty, of safekeeping prisoners confined in the jail of the county. The principle upon which the validity of the act is questioned * * * would almost annihilate the powers of ordinary legislation; for what public statute is there that may not act upon his duties?" He thus disposes of the contention that the sheriff takes his office charged with duties applying to it when the constitution went into effect, and, in doing so, he quotes with approval

Treasurer v. Taylor, 2 Bailey (S. C.) 524. "It would seem indisputable that the legislature has the right to regulate the execution of the duties which are incident to the office of sheriff, and to demand an indemnity for their faithful discharge. If it be not so, then it necessarily follows that, since the sheriff is in office under the constitution, he could be bound to perform only such duties as had been prescribed before the constitution, and all legislation since has been idle and worse than idle. No one, I presume, would contend for positions which they were sensible would lead to such consequences. * * * The current of authority then is unbroken and unvaried that a public office is not held by contract, within the sense of that term as employed in the constitution, but it is an appropriate exercise of legislative power and within legislative competency to reform the office and change and modify its duties at pleasure, unless the constitution of the state shall by express provision have fixed that duty." The constitution of North Dakota has not fixed the duties of sheriff, but on the contrary, by section 173, has expressly delegated that power to the legislature; and section 2 of the schedule expressly empowers the legislature to alter or repeal any law in force when the constitution was adopted. The opinion in the case cited proceeds to show that in Georgia the duties of the sheriff were governed, when the constitution was adopted, if such theory is correct, by the law relating to the duties of the same officer in England, which made him the associate of the king, chief executive and military officer of the county, vested with high judicial powers, all of which were gratuitously discharged; that such construction would be contrary to the spirit of the constitution, and would be ridiculous and absurd; and that, if this principle were to apply to the office of sheriff, it would apply with equal force to all laws, which would by the application of the principle be indelibly fixed upon us, and which could not be changed, since any change would effect the sheriff in his powers and duties, and make them different from what they were in England at the period of the adoption of the Georgia constitution; and, relating to this principle, the learned judge uses this language: "That such doctrine would mean that the framers of the constitution, with the iron hand of imbruted despotism, stamped inflexible immutability upon our institutions; have bound us to the notions of our ancestors, no matter how exploded by the sentiments of society, or inconsistent with its interests; and not merely limited, but

abolished, the power of the legislature, in the very effort to organize it. The proposition is too monstrous to be for a moment entertained."

While this law is attacked as an interference by the state with the right of counties to local self-government, the majority opinion is confined on that subject mostly to authorities relating to cities and towns. This is doubtless due to the fact that the books contain practically no cases showing that the doctrine has been contended for on behalf of counties, or held to apply to them, while they are very numerous as relates to cities. It may be contended that there is no distinction in the principle. For the purposes of this case, this may be conceded, although in my opinion the principle of local self-government, while possibly applicable in some respects to counties, is far less applicable to them than to cities and towns, and it is so held by the various authorities, from some of which I have quoted. A county is only a quasi municipal corporation, while a city is a full municipal corporation. The county has far less interests which may be termed private than has a city. But assuming that the law relating to police powers, and the principles of local self-government which Prof. Goodnow in his work on Municipal Home Rule says is more properly termed "local self-administration," applies alike to cities and counties, I shall discuss it without making any distinction, and the principles established by the authorities which I cite relating to the doctrine in cities apply with equal and greater force to counties.

As shown, the functions of a municipal corporation are dual or twofold. They relate not only to the conduct of the private and the local affairs of the corporation, such as the care of streets, sidewalks and waterworks, and other similar duties, and the ownership of necessary property to enable them to conduct their affairs, but they also have duties, as agents or departments of the state, for the local enforcement of law, the collection of taxes, and in many other ways. The distinction between those duties which are purely local and private, and those which devolve upon the municipality as the agent of the state, have not always been clearly made where the doctrine of local self-government has been conceded or upheld, but I find no case in any state extending the doctrine to those duties relating to its public functions as an agent or local subdivision of the state for the administration or enforcement of state laws. The failure to note this distinction, I think, is re-

sponsible for the misapplication of the principle of local self-government which it appears to me my associates have made. This distinction is noted in nearly all the authorities, though in some it has not been necessary to call attention to it. Mr. Eaton in his articles notices it, but nowhere contends that the doctrine extends further than to the administration of purely local affairs, and concedes that it does not extend to the other functions of municipal corporations. In discussing it, he says in the *Harvard Law Review*, vol. 14, p. 128, "It is not denied that the legislature can appoint state police," but, however, claims that if the legislature does so it must pay them with state money, and this is the distinction he makes regarding peace officers appointed by the state and those appointed by a city. Again he says, page 649, vol. 13, "Of course, the state may appoint state constables and pay them"; and again, at page 651, he expressly admits the power of the state legislature in case of necessity to create a system of state police for the prevention of crime, his only contention being that in doing so it should not abolish the municipal police.

Black, in his work on Constitutional Law, at section 134, says: "In respect to all those matters in which the people of the state generally have an interest and concern, the legislature may require and compel the municipalities to discharge duties, perform works, and, if necessary, contract debts; but in regard to matters of purely local concern which are not of importance to the state at large, and which are generally best regulated by the local authorities, the rule of local self-government requires that the municipality should be controlled only by the preference and determination of its own citizens. The double functions of municipal corporations require them to assume a share in the performance of state duties, as the legislature shall apportion the same, and also to regulate the matters which only concern the particular community. In respect to the first class of duties, the legislature has control, and it may grant, modify or abrogate municipal powers as its wisdom shall dictate. * * * While municipal corporations are subordinate agencies of the state, and as such subject to the control and legislative authority of the state, yet they are also in some respects assimilated to private corporations in respect to their rights and powers. Governmental powers granted to the municipality may be altered or revoked." And again at section 136: "Officers having to do with municipal corporations are of two sorts; those whose

functions concern the whole state or its people generally, although territorially restricted, and those whose powers relate exclusively to matters of purely local concern. Officers of the former class may be appointed or regulated by the state authorities, but the principle of local self-government requires that the choice of officers of the latter class should be left exclusively to the people of a particular community. The administration of justice, the preservation of the public peace and the like although confided to local agents, are essentially matters of public concern, while the enforcement of municipal by-laws proper, and the establishment of gas-works or waterworks, and the like, are matters which pertain to the municipality as distinguished from the state at large." This is also the doctrine announced by Judge Dillon in his work on Municipal Corporations at section 58.

Black continues: "Thus a municipal board of police is clearly an agency of the state government, and not the municipality, and therefore belongs to the first class above mentioned." This is also held in *People v. Hurlburt*, *supra*. At section 138, Mr. Black gives the particular limitations upon the power of municipal corporations to enact by-laws, and, among other things, he says, "They must not be in conflict with any provision of the constitution of the state, nor with the general statutes of the state, and must not exceed or violate the limitations imposed by the charter of the particular community." It may be pertinent to inquire, if the municipality cannot pass by-laws in conflict with the constitution or the laws of the state, can it accomplish the same result, but even more effectually, by electing officers who are pledged to permit the violation of such laws, and the state be left powerless to enforce either its own constitution or its laws?

The Supreme Court of the United States minimizes the doctrine of local self-government, and in *Barnes v. District*, 91 U. S. 540, 23 L. Ed. 440, says: "A municipal corporation in the exercise of all its duties, including those most strictly local and internal, is but a department of the state. The legislature may give it all the powers such a being is capable of receiving, making it a miniature state within its locality. Again, it may strip it of every power, leaving it a corporation in name only, and it may create and recreate these changes as often as it chooses, or it may itself exercise within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes those of

an agency of the state and at others a municipality, but that, its character and nature remaining at all times the same, it is great or small according as the legislature shall extend or contract its sphere of action." And again, in *City of New Orleans v. New Orleans Waterworks*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943 : "The municipality being the mere agent of the state it exists in its governmental or public character in no contract relations with its sovereign, at whose pleasure its charter may be amended, changed or revoked, without the impairment of any constitutional obligation, while with respect to its private and proprietary rights and interests it may be entitled to constitutional protection."

In Mr. Eaton's articles he refers to the case of *State v. Moores*, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624, as an authority strongly supporting the principles enunciated in the majority opinion, and the opinion in *Newport v. Horton*, *supra*, refers, in connection with this case, to Nebraska as the only state still holding that police officers are not state officers, and their control and appointment a proper subject for state legislation; but in *Redell v. Moores*, 63 Neb. 219, 88 N. W. 243, 55 L. R. A. 740, 93 Am. St. Rep. 431, *States v. Moores* is overruled, and the Supreme Court of that state in overruling it used some very forceful and cogent arguments. The latter case refers to the constitutionality of a statute conferring upon the governor the power to appoint members of a board of fire and police commissioners of cities. This case upholds the power of the legislature to make these provisions, and in referring to the former opinion of the court it says: "After careful examination of the opinion, and with all due appreciation of the learning and the ability of the members of the court who concur therein, we beg to say that it does not commend itself to our judgment. It holds that the provisions of the statute placing the power to appoint members of the board of fire and police commissioners in the hands of the governor are invalid, not because they are in conflict with any express provisions of the state or federal constitutions, but because they are repugnant to the inherent right of local self-government, which it is claimed was retained by the people at the time of the adoption of the organic law. As far as individual members of society are concerned, in the nature of things there can be no such thing as an inherent right to local self-government. The right of local self-government is purely a political right, and all political rights of necessity have

their foundations in human government. For an individual to predicate an inherent right, a right inborn and inbred on a foundation of human origin, involves a contradiction of terms. So far as a city is concerned, considered in the character of an artificial being, it is the creature of the legislature. It can have no rights save those bestowed upon it by its creator. As it may have been lacking some right bestowed upon it, it is in no position to complain should the power that bestowed such right see fit to take it away; in other words, the power to create implies a power to impose upon the creatures such limitations as the creator will, to modify or even destroy what has been created. The power to create a municipal corporation which is vested in the legislature implies a power to create with such limitations as the legislature may see fit to impose, and to impose such limitations at any stage of its existence.

* * * We have been taught to regard the state and federal constitutions as the sole tests by which the validity of the acts of the legislature are to be determined. If the majority opinion in that case is to stand as the settled law of the state, then in addition to such test there is another, an elusive something, elastic and uncertain as an unwritten constitution, which may be invoked to defeat the legislative will."

People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677, is cited as an authority in the majority opinion. I, however, do not read it that way. It holds that the legislature cannot by special act deprive the city council or the proper local authority of a city, of all discretion in respect to local improvements, when the charter leaves such matters to the judgment and direction of the local authorities, and that the legislature is limited under the California constitution relating to assessments to preventing the abuse by municipalities of that power. The learned court discusses at great length the powers of municipalities in such matters, and limits their uncontrolled exercise of those powers clearly and emphatically to internal affairs of purely local concern, and cites with approval the opinion of Judge Campbell in *People v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202, wherein he says: "There is a clear distinction between the functions of officers whose jurisdiction is limited territorially, considered as agents of the state and as agents of the municipality. The only confusion existing on this subject has arisen from the custom, prevalent under all free governments, so far as possible of making use of local corporate agencies whenever it can be done

profitably, not only in local government, where it is required by clear constitutional provisions, but also for the purposes of the state." This case also approves the statement of Mr. Dillon, who says: "It is important to bear in mind the distinction between the state officers—that is, officers whose duties concern the state at large and the general public, although exercised within definite territorial limits—and municipal officers, whose functions relate to that particular community." The California court in this case holds that, while the same individual may unite in himself the capacities of a state and a municipal officer, as to matters in which he acts for the state he is not a city officer, but a state officer, and that there is nothing in the nature of things which precludes an officer in his municipal capacity from being clothed with functions and being entitled to immunities with which he is not vested, and which he cannot claim as an agent of the state at large.

In *Newport v. Horton*, *supra*, the Supreme Court of Rhode Island says: "The proposition of the petitioners goes too far. It assumes that, because state control interferes at all with local control, it violates the principles of local self-government. In any system of government, towns, as well as individuals, must yield something of individual independence for the public good. The most important laws are made by the legislature, and agencies are created to enforce them. Ordinarily the state makes use of existing agencies, like town or city officials, to do this, but none the less are they the officers of the state. To say, therefore, that the state cannot assume control of these agencies in public affairs is to say that a town can nullify a state law which it does not approve by choosing officers who will not enforce it. This is not the national doctrine, and for a stronger reason it cannot be the state doctrine. Two replies to this statement can be made: First, that the state can appoint its own officers to enforce its law. To this we reply that economy and expediency at once suggest the futility of having two sets of officers whose duty it is to do the same thing, and also that we see no more infringement of the right of local self-government in appointing special state officers to execute a law than in requiring local officers to execute the same laws. It may also be said that courts should not assume that local officers will not do their duty. The court does not so assume. The legislature has evidently made the assumption by the action it has taken and assuming its power, the question of policy is one for the legis-

lature exclusively. What the petitioners really claim is local independence, rather than local self-government.

In Michigan, the doctrine of local self-government seems to have received from the courts its most emphatic endorsement, but in none of the cases reported from that state does its court of last resort hold that the principle applies to municipal corporations in relation to their public functions. The last case I find from that state marking the distinction is *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783. It upholds an act establishing a city board of health to be appointed by the governor, and the opinion refers to the distinction between public and private functions, and says, "In the discharge of public duties, there is no right of local self-government involved," and "that the care of the public health is within the police power, and therefore within the control of the legislature," and that it concurs in the distinction made in the prior Michigan cases between local and general duties, and that as regards duties which the people in the several counties owe to the commonwealth at large they cannot be allowed discretionary authority to perform them or not as they may choose. Such an authority would be wholly inconsistent with anything like regulated or uniform government in the state, and whenever the legislature imposes the performance of public duties there is no right of local self-government involved. They have certain duties imposed upon them which are of a governmental character, and which are performed by the local corporation bodies as the agents of the state, and such duties may be enlarged or diminished at the will of the legislature.

In *Attorney General v. Lowrey, et al.*, 131 Mich. 639, 92 N. W. 289, in speaking of quasi corporations, it uses this language: "They consist of counties, townships, school districts, highway districts, etc. They are governmental agencies, and it is, to say the least doubtful if they are in any respect anything else, or have any rights that can be called private. They perform many functions, but these are for and about the business of the state, which has imposed upon them the responsibility and expense of maintaining highways, schools, drains, and bridges," etc. And the opinion in *Youngblood v. Sexton*, 32 Mich. 407, 20 Am. Rep. 654, is a direct answer to the construction placed upon the early Michigan cases by the majority opinion. An act of the legislature of Michigan transferred the duties of tax collectors from city, town-

ship and village officers to the sheriff of the county. Objection was made that collectors had a constitutional right to perform all the duties that belonged to their offices when the constitution was adopted, including the collection of taxes, and the court, through Judge Cooley, says: "Admitting what these complainants insist upon, that the township and city collectors have a constitutional right to perform all the duties that belonged to their offices when the constitution was adopted, it does not follow that they were entitled to collect this tax. A constitutional right to perform the old duties cannot be extended to cover the new duties merely because they happen to be of a similar nature. This law takes from the local officers nothing. The complaint of it is that in providing for a new duty it confers it upon another officer instead of the city and township officers. In this there is nothing unusual. Sheriffs in many states are collectors of taxes, and in this state they have always in contingencies been collectors. It is true that in collecting this tax the sheriff acts upon behalf of the municipalities, but so he does in any case where the tax warrant is delivered to him; and so do the county treasurer and auditor general in collecting taxes, for they collect the local taxes, as well as those levied for state purposes. The whole tax system is something in which the state at large is concerned, and the rules by which it may be made to operate harmoniously cannot be rules so inflexible as not to yield to circumstances, when the legislature deems it essential. But there is another consideration that is conclusive on this point. This objection, like the last, is supposed to find support in *People v. Hurlburt*, supra. But in that case we took especial pains to show that for some purposes the townships, villages and cities of the state could not be permitted to act independently, but were and must be subject to compulsion by the state. The case of taxes for general purposes was especially instanced, and it was said that municipalities could not be left to collect them, and they must sustain local government, whether willing to do so or not. To that extent every part of the state was concerned in the action of the other part, because disorder in one locality would derange more or less the whole system. In the previous case of *People v. Mahaney*, 13 Mich. 487, it had been decided that the state had power to take control of the police of the city; and this was cited with approval in *People v. Hurlburt*, on the express ground that the police of the state and the preservation of order in every

locality was a matter of state concern, and not of mere local interest. It requires no argument to demonstrate this; the effect upon the whole state of abrogating local government in a single township or city, and leaving everything to the unrestrained passions of bad men, would inevitably be pernicious beyond estimate. Now the law under consideration, though having revenue for one object, has the police power of the state for another. It was deemed important to adopt it as a matter of police regulation. The legislature saw fit not to leave it to localities to enforce it or not at their option, and it is a matter of reasonable inference that they refrain from doing so because the refusal of a locality to enforce it would introduce disorder into the system. Whether that was the reason or not, they had, as we think, an unquestionable right to make all such provisions as they deemed essential to preclude the possibility of the law being nullified in any quarter. If to accomplish this it were deemed essential to commit the execution of the law to county instead of municipal officers, we know of nothing to preclude it. There is certainly nothing in the previous decisions of this court that is inconsistent with this feature of the law."

In all matters of general concern there is no local right to act independently of the state, and the local authorities cannot be permitted to determine whether they are to contribute through taxation to the support of the state government or assist when called upon to suppress insurrections, or aid in the enforcement of state laws. Upon all such subjects the state may exercise compulsory authority and may enforce the performance of local duties, whether by employing local officers for that purpose, or through agents or officers of its own appointment. *People v. Detroit*, *supra*; *People v. Mahaney*, *supra*; *Bay City v. State Treasurer*, 23 Mich. 503; *People v. Hurlburt*, *supra*.

The Indiana court is cited as an authority in the case at bar, but in *Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93, in an opinion holding that a board of metropolitan police and fire board to be appointed by the legislature for cities, which is to have the control of both departments, is unconstitutional, as a denial of the right of local self-government, the court says: "If the act related alone to the management of the police department, and the state proposed to take upon itself the burden of maintaining the department as well as its management, or if it were made

to appear that the city failed to furnish a police force, or one that was insufficient for the protection of persons and property, then a very different question would be presented. And in *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566, that court upholds the constitutionality of an act establishing boards of metropolitan police consisting of commissioners appointed by state officers, and puts it upon the ground that, in providing for the appointment of officers connected with the constabulary of the state, there is simply the exercise of the power to provide for the selection of peace officers of the state, which does not invade the rights of local self-government.

Arnett v. State (Ind.) 80 N. E. 153, 8 L. R. A. (N. S.) 1192, expressly holds that the legislature can control the appointment of police commissioners of a city, for the reason that the maintenance of the peace, and the suppression of crime and immorality, are matters of general interest, and subject to state control, and not necessary to be submitted to the people of a locality, and states that this principle has so often been vindicated against attack that the question should now be considered at rest. To the same effect, see *State ex rel. Kennedy v. Broatch*, 68 Neb. 687, 94 N. W. 1016; *State v. Nolan*, 71 Neb. 136, 98 N. W. 657; *State v. Fox*, 158 Ind. 126, 63 N. E. 19, 56 L. R. A. 893; *State v. Hunter*, 38 Kan. 578, 17 Pac. 177; *Diamond v. Cain*, 21 La. Ann. 309; and *Commonwealth v. Plaisted*, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566—in which the courts held that the privilege of local self-government in any particular in which such privilege is not guaranteed by any provisions of the constitution is not ground for declaring an act of the legislature invalid.

In *State v. Fox*, *supra*, this language is used: "It is very clear from the tenor of the whole instrument that the constitution makers never intended that the territorial divisions recognized—that is, counties, townships and towns—should govern themselves independently of state supervision or state supremacy, but in every matter which affects the safety, morals, health or general welfare of the people at large there is undoubtedly reserved in the state the power to supervise, control, and even coerce local officers in the discharge of public duties, and even to send its own agents into organized districts, if necessary to enforce the public right or to accomplish a public benefit. * * * The enforcement of the state's criminal and revenue laws are of equal importance to all. In

all these, the setting up of corporation lines forms no barrier to the strong arm of the state in safeguarding every public interest."

In *State v. Covington*, 29 Ohio St. 102, an act of the legislature was held constitutional which vested the police power and duties of cities in a board to be appointed by the governor, notwithstanding the fact that at the time of the adoption of the constitution the police of cities were elected by electors resident therein, or appointed by boards or officers elected by such electors; and it was held that matters relating to the police power do not fall within the doctrine of local self-government. Also *People v. Shepard*, 36 N. Y. 285; *Metropolitan Board of Health v. Heister*, 37 N. Y. 661.

Astor v. N. Y., 62 N. Y. 567, holds that it would be carrying the doctrine of noninterference with local affairs far beyond any reported case to hold that in no case whatever could any of the powers existing in a local officer at the time of the adoption of the constitution be taken away without violating constitutional provisions. *People v. McDonald*, 69 N. Y. 362, holds that commissioners appointed by the legislature to widen designated highways, were lawful officers, because the commissioners of highways already in office were continued in office, with charge of the highway after the fulfillment of the office of commissioner appointed by the legislature. Same effect, see *Re Woolsey*, 95 N. Y. 135.

David v. Portland Water Committee, 14 Or. 98, 12 Pac. 174, sustains an act which empowers a committee appointed by an act of the legislature to establish or purchase waterworks, and says that the subjects ordinarily classed as private affairs often become matters of public importance, and holds that when the legislature determines they are of public importance they cannot be designated as mere private affairs.

The Colorado Supreme Court, in *Re Senate Bill*, 12 Colo. 188, 21 Pac. 481, holds that, while there was strong reason to recognize the right of local self-government, it was a matter pertaining to the policy of proposed legislation, rather than a question of constitutional construction. See, also, *State v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829, and *State v. Williams*, 68 Conn. 131, 35 Atl. 24, 421.

State v. Barker, 116 Iowa, 96, 89 N. W. 204, 57 L. R. A. 244, 93 Am. St. Rep. 222, relates to the validity of a law authorizing the appointment of trustees of the city water and supply system by the district court, and it was held that such provisions were unconsti-

tutional, because it conferred upon the court nonjudicial functions, and because it took from the city the right of local self-government; and in the opinion of the court a clear distinction is made between the dual functions of a municipal corporation. It says: "In our form of government the legislature creates municipal corporations, defines and limits their powers, enlarges or diminishes them at will, points out the agencies which are to execute them, and possesses such general powers over them as it shall deem proper and needful for the public welfare, and as to all matters of public concern, such as the performance by the city of functions as the agent of the state, the legislature has unlimited power * * * but the legislative control of municipal corporations is not without limitations"—and proceeds to show that the doctrine of local self-government is applicable to those functions of the city pertaining to the supplying of local needs and conveniences for its corporate advantage, and holds that the establishment and control of waterworks is a matter that pertains to the municipality as distinguished from the state at large, and to which the doctrine referred to applies.

The distinction between the functions of political subdivisions of the state which relate to their own duties and those wherein they act as the instrumentality of the state for the enforcement of law and for the carrying out of the general policy of state government runs all through the decisions of the courts relating to the liabilities of such subdivisions, and Prof. Goodnow, in his work before referred to, lays down the rule that municipal corporations are not responsible for torts committed in exercising a part of the state power, but that they are liable when acting in the exercise of those duties which are purely municipal or private. See chapter 7, and cases there collected and cited. The same rule applies as to the control of property and its alienation by municipalities. Prof. Goodnow cites the laws providing for public examiners in the states of North and South Dakota and several others, as evidence, as he puts it, that with the common sense that is characteristic of the people of this country we have, notwithstanding our supposed adhesion to the political theory of local self-government or administration, not hesitated to centralize our administrative system of subjecting our local authorities to the central administrative control whenever we have seen that uncontrolled local action has led to administrative inefficiency or inequality of financial burdens.

To those interested in the subject of municipal government, I commend Prof. Goodnow's work on *Municipal Home Rule*. No short excerpts from it can give an adequate comprehension of the far-reaching effect of the distinctions drawn between the functions which are termed "local" or "private" and those wherein they represent the sovereignty of the state.

The state of Vermont found the same difficulty in securing the enforcement of criminal laws in some counties which was experienced in this state, and which resulted in the statute which we are considering. In that state, state's attorneys can nolle pros. criminal proceedings; and to prevent this, and to ensure the enforcement of law, the legislature enacted a law providing for the appointment by the governor, in his discretion, of special prosecutors of criminal offenses within cities and towns where, by reason of neglect or inefficiency of local prosecuting officers, criminal laws of the state were not properly enforced, and authorizing such special prosecutors to institute prosecutions and to appear in court and control the trial and disposition of such cases, and required state's attorneys to assist in such trials. The constitution of the state contained the requirement that state's attorneys should be elected by the voters of their respective counties, identical in effect with the provisions requiring county officers to be elected in this state, but the Vermont constitution contained no requirement that the legislature prescribe their duties. A prosecution was commenced by a special prosecutor so appointed, and a petition for a writ of habeas corpus was heard by the Supreme Court, wherein it was complained that the defendant was proceeded against by a special prosecutor, and it was contended that his imprisonment was illegal, because the act authorizing such appointment was in conflict with the article of the constitution requiring the election of state's attorneys by counties, and the court held the act in question constitutional, and that the legislature had power to provide for the appointment of such officers by the governor, and by officers not elected by the people, although another phase of the law was not passed upon. *In re Snell*, 58 Vt. 207, 1 Atl. 566.

In Massachusetts, the legislature in 1865 enacted a law providing for state police, known as the "State Constabulary Law," which provided that the governor should appoint a state constable, who might appoint deputies who should be possessed of all the common-law and statutory powers of constables except the service

of civil process, and also the powers given the police or watchmen by the statutes of the commonwealth or the charters or the ordinances of the several cities, concurrently with such officers, and that their powers should extend throughout the commonwealth. The act also provided that among their duties they were to obey the orders of the governor in relation to the preservation of the public peace or the execution of laws, and to see that the laws of the commonwealth were observed and enforced, and to suppress and prevent crime by the suppression of liquor shops, etc. The constitution of Massachusetts provided for the election of sheriffs, and the governor could not appoint them; and in the case of the *Commonwealth v. Certain Intoxicating Liquors*, 110 Mass. 172, on this statute being attacked as unconstitutional, it was upheld as not being an invasion of the constitutional provisions relating to the position of sheriff. It will be observed that the provisions of the Massachusetts law were nearly identical with those of the one construed in the case at bar.

The Supreme Court of South Dakota had before it in 1892 a law which authorized the attorney general in certain contingencies to appoint such reputable attorney as he should see fit, and who should be authorized to sign, verify and file such informations or papers as the state's attorney was authorized to sign, file or verify, and to perform any act that the state's attorney might lawfully do and perform. This law was attacked, and the court says: "The contention of the defendant in error is that the legislature could not lawfully empower the attorney general to make this appointment; that it was the creation of a new office, and while the legislature might do this, it could not authorize the attorney general to do so. This position cannot be maintained. The office of attorney general is a constitutional office, but his duties 'shall be prescribed by law' (section 13, art. 4, Const.), and so with the state's attorney. 'The legislature shall have power to provide for state's attorneys and prescribe their duties.' Section 24, art. 5, Const. It is thus left with the legislature to define the duties of each of these officers. The attorney general is in the same department of service as the state's attorney, but having a larger jurisdiction, and is in a sense a superior and supervising officer. We have no doubt, but that it would be competent for the legislature to authorize the attorney general to appoint an assistant for himself, or an assistant or deputy state's attorney, in any county,

naming the conditions under which such appointment might be made. This would not be delegating to the attorney general the legislative power to create a new office any more than a law authorizing a sheriff or register of deeds to appoint a deputy whenever a proper discharge of his official duties required it. It is no objection that a statutory law authorizes an appointment of a deputy to a constitutional officer, and such a law may empower such deputy to discharge official duties in his own name. *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108; *Calender v. Olcott*, 1 Mich. 344; *Rose v. Newman*, 26 Tex. 134, 80 Am. Dec. 646. Very nearly this same question was raised and decided in *Re Gilson*, 34 Kan. 641, 9 Pac. 763, where a provision of their prohibitory law [of which the one under consideration is nearly a copy] was sustained." *State v. Becker*, 3 S. D. 29, 51 N. W. 1018.

Mr. Dorman B. Eaton, in his celebrated work on the Government of Municipalities, says: "The subject of home rule for municipalities—the question how far their residents should be allowed to control their own local affairs—is one of great importance, as to which there seems to be much confusion of thought. It is quite in harmony with our republican system, and highly desirable, that public authority should not be needlessly centralized; that it should be as directly and largely exercised by bodies and officers of local jurisdiction as is compatible with just and efficient government for the nation and states. Indeed, one of the paramount objects in the creation of cities and villages—as in the creation of towns, counties, and even of states—is to facilitate the local control of their truly local affairs. The government of each of these jurisdictions involves a common principle and policy. The problem of home rule, as we ought to clearly see at the outset, raises not only a question between cities and states, but one between the states and the nation; for the pretended right of secession was but a phase of the question both of principle and policy. We ought clearly to see at the start that if a city has the absolute right to control what it may be pleased to call its own affairs, a village, a town, and a county may have the same right. These principles are indisputable. * * * Legally considered, the claim of right, on the part of every city, town or village, to regulate its own affairs, is a mere question—to be decided by the proper courts—as to the true interpretation of the constitution and laws applicable to them. It hardly need be said that on every basis of justice and law

according to which a city or village may claim a right to home rule, a county and town may make a like claim. The state in short has a duty to govern every part of its people and territory—the city and forest equally—in the way that will be best for the whole of them. The whole of its people have rights and interests paramount to those of any portion of them. * * * Any theory of home rule incompatible with these conditions is false in principle and tends to insubordination, to internal conflicts, to disintegration, and to rebellion.” Government of Municipalities, Eaton, p. 28. And on page 29 of his work he makes these pertinent suggestions: “It should be regarded as fundamental that authority for home rule is one to be conceded for improving and not for degrading local government or morality. Therefore if a city or village, by its own local vote, asks for authority to close its grog-shops, its gambling haunts, or its dens of infamy, apparently the state should grant it. But suppose they are closed under state laws, and such a vote, the expression of the most degraded city majority, asks authority to open them, and make them free to all, who will say that such a vote is good reason for granting larger power for so vile a home rule? Who can maintain a right to home rule authority for making things worse? The state has a duty to aid the most moral and patriotic of its citizens in their best endeavors. But it has morally no right to confer legal authority upon the citizens of its most degraded sections or cities, though they be in the majority, to do worse things than the vote of the whole people of the state would tolerate. Civilization would speedily decay under a state government which allowed the depraved and the partisan, merely because in majority in a city, to govern it corruptly and despotically. If the gamblers and thieves shall gain the majority in a town or city, will it be the duty of the state to repeal the laws against their crimes, or to allow those who violate them to go unpunished?

It is significant of the thoughtless facility with which false and dangerous theories of home rule have lately found acceptance that the vital distinction here pointed out—the duty of the state to confer local power for improving and not degrading local government—has not been noticed, and that unscrupulous party majorities in great cities, shouting for larger home rule for degrading and partisan ends, have been, in substance, taught that they have a right to it, irrespective of consequences, merely because such a majority demands it.

Some readers may regard these elementary statements as being such mere truisms as might have been omitted. We are sorry to be compelled to think otherwise, and to find evidence of the vicious effects of the false theories they expose—theories which have caused tens of thousands of city voters to think they have been wronged in not being allowed to have their own way in wrongdoing in city affairs. These theories have supplied partisan demagogues with specious and vicious arguments. And, besides, if we concede that a part of the state called a “city” has the right to have as many grog-shops, lottery offices and gambling haunts as its majority desires, why must we not allow that part of a city called a “ward,” or a “district,” the same privilege, whenever its majority demands it?

The doctrine of home rule, as often presented, is not only one tending to disintegration, insubordination and anarchy, but is one which enfeebles the state and degrades it in the estimate of the people, in the same degree that it stimulates selfishness, arrogance, and partisan domination on the part of cities. When several states made war on the Union in the name of false theories as to the right of home rule, a mayor of New York, Fernando Wood, rightly interpreted their example, when he proclaimed the right of the city of New York to be a free city. Some of the champions of unrestrained home rule for cities seem to go quite as far as that notorious mayor, when they declare that “our large cities must stand in the same relation to the national government that states do,” and that it is necessary “our large cities should be free cities.”

We have on one side the sovereignty of the people of the whole state, and among the elements of such sovereignty is the police power, as I have shown by citations and otherwise, existing in the very foundations of society, even before the organization of the state or constitution, a power necessary to the maintenance of the state, to its self-protection and preservation as a unit of the American nation, and as a body whose supreme duty is to protect the peace and sovereignty of its citizenship, and the good order of communities, and we have article 20 of the constitution, *supra*, commanding the legislature to prescribe regulations for enforcing its provisions. On the other hand we have the doctrine—announced in the majority opinion—that it is not competent for the legislature to enact laws taking from sheriffs or state’s

attorneys any of the duties incident to those offices wherein they act as agents of the state, in the preservation of order, and confer them upon any officer appointed by central authority, or by any other means than by the voters of a county, even though necessary to accomplish the ends of its creation. It is and must be conceded that this doctrine rests solely upon implication; that it is not contained in the constitution in express language, and rests for this implication only upon the ground that the constitution authorizes counties to elect sheriffs and state's attorneys. Now, what is the result? That the first of these principles is fundamental cannot be denied. This being so, we have a conflict in principles, and the question for courts to determine is, which shall prevail? It is an elementary principle of interpretation that, if two constructions of the constitution are possible, the effect of one of which is to maintain and carry out the underlying principles and purposes of the instrument and preserve and protect society, while the effect of the other would necessarily, or only might, be the destruction of organized society or the depriving of the state of the means to promote the purposes of its existence and protect itself by maintaining law and order, then the former construction should be adopted. In other words, if one construction is innocent and conforms to the purposes of the instrument, while the other has a contrary effect, then that construction should not be given effect which leads or may lead, to harmful results. Sutherland, *Statutory Construction*, section 238; *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677; *People v. Terry*, 108 N. Y. 1, 14 N. E. 815; *State v. Hope*, 100 Mo. 361, 13 S. W. 490, 8 L. R. A. 608; *Bowers v. Smith*, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491; *Leonard v. Commonwealth*, 112 Pa. 607, 4 Atl. 220.

A constitutional provision should not be so construed as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief it was aimed at (*Jarrolt v. Moberly*, 103 U. S. 585, 26 L. Ed. 492), and courts will look to the history of the times and examine the state of things when the constitution was adopted to ascertain the old law, the mischief, and the remedy. 6 Am. & Eng. Enc. Law, 930, notes 3 and 4.

No court of justice can be authorized so to construe any clause of the constitution as to defeat its obvious ends when another construction equally accordant with the words and sense thereof will

enforce and protect them. *Prigg v. Pennsylvania*, 16 Pet. (U. S.) 612, 10 L. Ed. 1060; *Legal Tender Cases*, 12 Wall. (U. S.) 531, 20 L. Ed. 287. When a general provision conflicts with a special provision, the general must yield to the special. *Warren v. Shuman*, 5 Tex. 441; *Gulf R. R. v. Rambolt*, 67 Tex. 654, 4 S. W. 356. What force does section 11 of the constitution, requiring all laws of a general nature to have a uniform operation, possess, if the operation of a law general in its terms and intended to apply to all people of the state alike must, notwithstanding this, depend upon the approval of a majority in any locality before it can become operative locally? The fact that a majority in any county does not care for the protection supposed to be afforded by the constitution and the law is of no importance. If one person needs and desires such protection, he is entitled to have the fullest exercise of the sovereignty of the state in his behalf, and no implication should deprive him of this.

I have indicated the circumstances under which article 20 of the constitution was adopted. It requires that "the legislature shall prescribe regulations for the enforcement of its provisions," and from citations hereinbefore made it is clear that under such circumstances courts construe the kind and character of such regulations as being within the legitimate exercise of the judgment of the legislature; that it is the judgment of the legislature rather than courts that is to be exercised. And again, the people having voted upon this article separately from the remainder of the constitution, and having by their votes adopted it, it was given an emphasis which otherwise would not have belonged to it, and it is entitled to a liberal construction with a view to carrying out the purpose of the voters in adopting it. When one section treats specifically and solely of a matter, that section prevails in reference to that matter, over other sections in which only incidental reference is made thereto, because the legislative mind, having been in the one section directed to this matter, must be presumed to have there expressed its intention, rather than the sections where its attention was turned to other things, and the same rule applies to constitutional provisions. 26 Am. & Eng. Enc. Law, 620, and cases cited; *Warren v. Shuman*, supra; *Gulf R. R. v. Rambolt*, supra.

It is an elementary principle that when a power is conferred everything necessary to carry out the purpose of the power con-

ferred, and make it effectual and complete, will be implied, and the legislature is the sole judge of the methods necessary to the accomplishment of the objects which it seeks to attain. *Studabaker v. Studabaker*, 152 Ind. 89, 51 N. E. 933; *Sutherland*, Statutory Construction, sections 340, 341; *Cooley*, Const. Lim. 194; 26 Am. & Eng. Enc. Law, 614; 6 Am. & Eng. Enc. Law, 928, note 4. See *Arnett v. State*, *supra*, and cases cited. Section 68 of the constitution reads: "The legislative assembly shall pass all laws necessary to carry into effect the provisions of this constitution." The state, and the several counties within the state, had had nearly 20 years' experience, and that experience proved that the execution of these provisions could not be intrusted to the people of certain localities, or to the officers elected by them, and the judgment of the legislators devised another method, whereby an officer was appointed to co-operate with the governor of the state in maintaining the supremacy of the constitution. The question was one of policy and method, and solely within the judgment of the legislators, and, through the law in question, they expressed their judgment as to the means necessary to secure enforcement. Their judgment cannot be revised by the courts. Local option, as I have heretofore indicated, was in effect when the people voted prohibition of the liquor traffic into the constitution. They had given it a trial; it was condemned by their own votes. It has remained for this court to say that the people of this state were ignorant of what they desired to secure, and of what they were doing, and that, while they believed that they were voting out local option and voting in prohibition, they were in fact changing from legislative to constitutional local option, and that the requirements of the legislature contained in article 20 left little or nothing to the discretion of that body; that it is powerless to exercise its best judgment as to what regulations are necessary or best to comply with or enforce the provisions or commands of that article.

The logical and practical application of this decision in this proceeding means that this state not only has, in spite of the plain terms of the constitution to the contrary, local option as to the liquor traffic, but worse yet, that it lies in the option of any county, indirectly, by electing officers pledged to violate their oaths of office, to disobey any or all statutes enacted for the suppression of crime, for the promotion of public health and morality, for the protection of life and property, the assessment and collection of

taxes, and the education of children, and, in effect, to nullify at will any part or the whole police power, heretofore supposedly embedded in the very beginning of society, and older and more sacred than the constitution itself. Under it the people of any locality may defy the power of the state to preserve order, and maintain partial or total anarchy, as they may elect.

It must not be overlooked that, in construing a constitution, the courts always regard not simply what is happening, but what may or what is possible to happen. I repeat that the things above suggested are possible under an undue, and as I believe unwarranted extension of the principle of local self-government, so-called. I, however, have little fear that such conditions will ever prevail to any considerable extent. Fortunately, there will always be a majority of the people in most, and I believe in the near future in all, our counties, whose respect and reverence for law, though they may doubt the wisdom of a particular law, will prevent the prevalence of any such conditions.

From a review of all the authorities on the subject to which I have had access, I find none holding that positive prohibition not contained in the constitution can rest solely upon implication, when the result or effect is or may be to deprive the state of its police power, and negative its ability to afford its subjects the protection which is intended to operate as among the primary functions of the state. No such doctrine should be based upon any mere implication. The statement of it means that the county is bound by no laws except those its people may choose to ratify, and that all others may be annulled or resisted locally. "Our constitution does not contain the absurdity of giving power to make laws, and another to resist them." At least such absurdity should rest upon some stronger authority than any derived merely by implication, when opposed by a positive prohibition. The enforcement of the criminal laws of the state has been universally conceded as a function of the state, and not solely included in the proper sphere of local self-government, the principle of which only applies to matters in which the people of the state at large have no interest, and I deem it beyond the province of the courts to hold that, because the constitution has permitted the election of state's attorneys and sheriffs by counties, it must be implied that the exclusive right and power to say whether criminal laws shall or shall not be observed rests in each county.

From a consideration of the cases cited and many others, I am satisfied that the state has, within well-defined limits, the right to prescribe the methods and means to be used to enforce its criminal laws; that the office provided for in the law in question was a state office, with state and not local duties; that the providing for it was a political question, the determination of which was within the judgment of the legislature, and not subject to the review of courts; that it exercised its judgment as to the method best adapted to meet the emergency, and without conflict with any principles of local self-government; but that if there existed such conflict, the express command and prohibition of the constitution should prevail rather than anything which must be read into it or unnecessarily implied from it.

I therefore conclude that the law in question is not subject to the objections made, but is a proper exercise of the legislative powers and functions.

The principle of the majority opinion is very far-reaching, and by implication puts a restriction on legislative power and discretion, as well as upon the people of the state, so great that it will be found, under the practical working of the rule announced, that the lawmaking power will be seriously hampered in framing legislation to meet new situations as well as present and future conditions, and this is my apology for the great amount of space which I have used in expressing my views and the reasons which seem to me to afford them ample support.

(114 N. W. 962.)

HARRY D. RUETTELL AND W. C. TUBBS, CO-PARTNERS UNDER THE FIRM NAME AND STYLE OF HARRY D. RUETTELL AND CO., AND INDIVIDUALLY, V. THE GREENWICH INSURANCE COMPANY, A CORPORATION, AND COMMERCIAL UNION ASSURANCE COMPANY, LIMITED, OF LONDON.

Opinion filed Nov. 13, 1907.

Appeal — Review — Findings.

1. The findings of the trial court in an action at law where a jury trial has been waived are presumptively correct, and will not be disturbed unless shown to be clearly against the preponderance of the evidence.

Corporations — Transfer of Partnership Property.

2. The mere organization of a corporation with a view of taking over the business and property of a copartnership does not of itself transfer the title of the partnership property to the corporation.

Same — Evidence.

3. Evidence considered, and *held* not to show a transfer of the title to partnership property to a corporation formed for that purpose.

Appeal from District Court, Cass county; *Pollock, J.*

Action by Harry D. Ruettell and William C. Tubbs, partners under the name of Harry D. Ruettell & Co., against the Greenwich Insurance Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Charles F. Templeton and Scott Rex, for appellant.

Issue of stock not essential to corporate organization. *Singer Mfg. Co. v. Peck*, 67 N. W. 947.

A corporation is a distinct person, and its property is vested in it, not its stockholders. *Peabody v. Flint*, 6 Allen, 52, 55; *De La Vergne Refrigerating Machine Co. v. German Savings Institution, et al.*, 175 U. S. 38, 44 L. Ed. 65.

Title to property having vested in the corporation prior to the fire, plaintiffs cannot recover. Section 5905, Rev. Codes 1905; May on Insurance, section 264; Joyce on Insurance, sections 901 and 2521.

Change in the title, possession or interest in the subject of insurance voids the policy. *Tierney v. Ins. Co.*, 4 N. D. 565, 62 N. W. 642; *Northam v. Duchess Co. Insurance Co.*, 59 N. E. 912; *Moore v. Hanover Fire Ins. Co.*, 36 N. E. 191; *Oswald v. Moran*, 8 N. D. 111, 77 N. W. 281; *Willis v. Trust Co.*, 169 U. S. 295, 42 L. Ed. 752; *Home Ins. Co. v. Collins*, 85 N. W. 54; *Hathaway v. Ins. Co.*, 20 N. W. 164; *Oakes v. Ins. Co.*, 131 Mass. 164; *Brown v. Ins. Co.*, 156 Mass. 587; *Langdon v. Ins. Co.*, 22 Minn. 193; *Gibbs v. Ins. Co.*, 61 N. W. 137; *Walton v. Ins. Co.*, 22 N. E. 443; *Chulck v. U. S. Fire Ins. Co.*, 30 Pa. Sup. Ct. 435; *Cooley's Briefs on Insurance*, Vol. 2, p. 1714.

Robert M. Pollock, S. G. More, L. L. Twiche'll, for respondents.

Mere contract of sale and future delivery is not a breach of condition of the policy. *Browning v. Home Insurance Co.*, 71 N. Y. 508; *Kempton v. State Ins. Co.*, 17 N. W. 194; *Grabel v. German Ins. Co.*, 49 N. W. 713.

Findings will not be disturbed unless against preponderance of testimony. *Jasper v. Hazen*, 4 N. D. 1, 58 N. W. 454; *Paulson & Co. v. Ward*, 4 N. D. 100, 58 N. W. 792.

MORGAN, C. J. Plaintiffs recovered a judgment against the defendant on a policy of insurance against loss by fire. A jury was waived, and the findings of fact are attacked as being against the preponderance of the evidence. A motion for a new trial was made on the sole ground that the findings of fact are not sustained by the evidence, and the motion was denied. The appeal, therefore, presents but one question—that of sufficiency of the evidence to support the findings and to warrant a recovery.

The facts are substantially the following: The policy of insurance on which recovery is sought was issued on December 24, 1903. On this day the plaintiffs were a copartnership and the owners of the stock of goods covered by the policy. The stock of goods was destroyed by fire on August 1, 1904. It is a disputed question whether the plaintiffs were the owners of the stock of store goods on said August 1st. The appellants claim that the property was then owned by a corporation known as the "H. D. Ruettell Company," to which was issued a certificate of incorporation by the Secretary of State of North Dakota on June 16, 1904. The copartnership was composed of Harry D. Ruettell and William C. Tubbs. These two persons and C. F. Ruettell executed the articles of incorporation on which a certificate of incorporation was issued on June 16th. The capital stock of the corporation was \$50,000. Whether any stock was issued seems to be a matter of dispute, but that no stock had been delivered before the fire seems to be established, notwithstanding contradictory statements in the record. Policies issued prior to June 16, 1904, were issued in the name of the partnership. After that date, all policies were issued in the name of the corporation, on the request of H. D. Ruettell, an officer of the corporation. In this case proofs of loss were waived, but proofs of loss under other policies were made by H. D. Ruettell, in which he stated under oath that the property destroyed was owned by the corporation. There is a conflict in the evidence arising, through

contradictory statements of witnesses, whether a transfer of the assets and property of the copartnership had been made and delivered to the corporation when the fire occurred. The members of the partnership, Ruettell and Tubbs, make these contradictory statements in giving their evidence on this question. But, when asked as to such statements, they explained them, and each stated positively that no transfer, bill of sale, or change of ownership or possession had then been made. It was because of the organization of the corporation and assuming the corporate name, in contemplation of an immediate transfer, that the contradictory statements seems to have been made. One Mason, a disinterested witness, drew up the incorporation papers and other papers in connection with the change from a partnership to a corporation, and all papers were left in his possession until some time in September. From his testimony it is quite clear that no formal transfer of the assets had been completed when the fire occurred. Some delay in consummating the transfer was occasioned by failure to agree upon the terms upon which C. F. Ruettell and H. D. Ruettell were to receive stock in the corporation, and a formal transfer was not made until after the fire. It fairly appears that no stock had been delivered to any members of the corporation before the fire, and no payments were made by any one in contemplation of receiving stock later on. The mere organization of the corporation did not vest title to the partnership property in it. Some action was necessary on the part of the partners in divesting themselves of title and on behalf of the corporation in receiving title. The most that can be gathered from the evidence as to transfer is that one was contemplated. If a transfer has been shown, it is only from statements of the partners and a transfer cannot be inferred from them in view of explanations subsequently made. If a transfer had not been actually completed, when the fire occurred, the legal title remained in the partnership and had not vested in the corporation. The policy contained a stipulation that it would become void "if any change other than by the death of the assured takes place in the interest, title or possession of the subject of insurance * * * whether by legal process or judgment or by voluntary act of the insured, or otherwise." It is this clause of the policy that the defendant relies on to defeat a recovery. The defendant relies upon the admissions of the partners in conversations, in letters, in documents, affidavits, and other papers to show that the corporation

owned the property lost by fire, which admissions were made after June 16th until after the fire. After a careful examination of all of the evidence in connection with the findings of the trial court, we are satisfied that the property was owned by the partnership when the fire occurred. The admissions to the contrary seem to us to have been satisfactorily explained by the persons making them while on the witness stand at the trial. This appeal presents a case where this court should give controlling effect to the findings of the trial court, who saw the witnesses and had an advantage not possessed by this court of observing their appearance and manner, and therefrom determining whether the explanations of the discrediting statements were given with candor or not. The weight to be given to the trial court's findings when that court is clothed with the same functions as a jury in determining questions of fact has often been before this court, and the following rule was laid down in an early case and adopted in later decisions: "Rather it intended, and such, we think, is the effect of the Wisconsin decisions, that, when a finding of fact made by the trial court was brought into this court for review upon proper exceptions, it should come like a legal conclusion, with all the presumptions in favor of its correctness, and with the burden resting upon the party alleging error of demonstrating the existence of such error. He must be able to show this court that such finding is against the preponderance of the testimony, and, where the finding is based on parol evidence, it will not be disturbed unless clearly and unquestionably opposed to the preponderance of the testimony." *Jasper v. Hazen*, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58; *Dowagiac Mfg. Co. v. Hellekson*, 13 N. D. 257, 100 N. W. 717.

Upon the vital issue whether there had been a transfer of title or possession, all the interested parties testify with positiveness that no transfer was made. There is no evidence that a transfer was actually consummated. The effects of the statements and acts that seemed to indicate a transfer must yield in view of the absence of any showing of actual transfer, and in view of the explanations and the positive finding of the trial court that no transfer had been made when the fire occurred, and that the plaintiffs then had the title and interest and ownership of the property. The record presents a case where it was particularly a question for the trial court to determine the credibility of the witnesses. That was the only question involved. If the witnesses are to be believed,

the evidence amply supports the contention that plaintiffs were the owners of the goods when the fire took place. If the record contained independent proof of transfer, the question would be different. But, the witnesses' credibility only being involved, the findings must be deemed conclusive in this case; the trial court having found them worthy of belief when the case was tried and again on the motion for a new trial. The findings of the trial court were not against the weight of the evidence on the issue as to whether there had been a transfer.

It follows that the judgment must be affirmed. All concur.
(113 N. W. 1029.)

WILLIAM C. MUIR v. ARTHUR P. CHANDLER.

Statute of Frauds — Oral Contract — Part Performance.

1. Conceding, without deciding, that the going into possession of real estate by a purchaser under an oral contract of purchase is such a part performance of the contract as takes the contract out of the statutes of frauds, the change of possession must be actual, open, and notorious, to support an action by the purchaser to enforce specific performance.

Same — Possession.

2. Plaintiff claims to have purchased a farm from defendant, who was and still remains in actual possession, by an oral contract only. The trade was not made at the farm, and the plaintiff did not even go upon the premises, but claims a part performance by reason of an oral contract entered into with defendant, after the contract of purchase and sale was made, to lease the premises back to defendant for a term less than one year. *Held*, there being no physical, actual change of possession, the defendant being in actual occupancy of the premises when the contracts were made, and continuing to occupy them until the trial of this action, and never having admitted plaintiff into possession of any part thereof, that the oral lease does not constitute such part performance as is necessary to take the transaction out of the statute of frauds.

Appeal from District Court, Cass county; *Pollock*, J.

Action by William C. Muir against Arthur P. Chandler. Judgment for defendant, and plaintiff appeals.

Affirmed.

Robert M. Pollock, for appellant.

There was a contract, of which the agreement of lease was a recognition and part performance, which was evidence of a contract of sale, sufficient to compel the court to enforce specific performance of an oral agreement. *Ungley v. Ungley*, L. R. 4 Ch. Div. 73; 3 L. R. A. (New Series) 790; see Foot Note III, pp. 793-798; Pom. Spec. Perf. of Contracts (2 Ed.) section 115.

Barnett & Richardson, for respondent.

Possession must be actual, open and notorious to serve as an act of part performance. *Roberts v. Templeton*, 3 L. R. A. 790, and note.

SPALDING, J. The evidence submitted on the part of the plaintiff in this case tends to show that on the 7th day of April, 1906, he entered into an oral contract with the defendant whereby he purchased from the defendant 1,440 acres of land, being a farm situated about thirty miles from Fargo, and that partial payment was to be made by him therefor on the 9th day of April, 1906; that on the last-named date he tendered the amount agreed to be paid and received to the defendant, and offered then and there to perform the other parts of the contract which were to be by him performed, but that the defendant refused to carry out the terms of sale agreed upon. It is also shown that, after the agreement of purchase and sale was entered into, a verbal agreement for the rental of the same premises was made, by the terms of which the plaintiff was to rent them to the defendant. All of these transactions occurred in the city of Fargo and form the basis of this action, which is brought to enforce the specific performance of the oral contract of purchase and sale. The defendant denies all the allegations of the plaintiff's complaint, and on the trial offered no evidence in support of his answer. In our statement of the facts we have given the plaintiff the benefit of any doubt as to the construction of the evidence submitted by him. The trial court made findings and entered judgment dismissing the action. From such judgment this appeal is taken.

Section 5407, Rev. Codes 1905, reads: "No agreement for the sale of real property, or of an interest therein, is valid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or his agent thereunto authorized in writing; but this does not abridge the power of any court

to compel the specific performance of any agreement for the sale of real property in case of part performance thereof." It is unnecessary for us to consider whether taking possession of real estate by the purchaser on an oral contract of purchase is sufficient performance of a contract to take it out of the statute of frauds. We can assume for the purposes of this case that it is, and on that assumption we shall consider the law applicable to the facts disclosed by this record. It will be seen that all this transaction occurred some thirty miles from the location of the real estate, so the plaintiff was not even upon the premises. They were at all times and still are in possession of the defendant. No actual physical change of possession occurred. The plaintiff bases his right to recover upon the fact that there was part performance of the contract by reason of and through the oral lease for a period of less than a year from the plaintiff back to the defendant after the contract of sale had been entered into orally. He contends that this leasing, being without the statute of frauds, constituted such a part performance as takes the original contract out of that statute. This is the sole question in the case.

The appellant cites as an authority sustaining his contention *Ungley v. Ungley*, L. R. 4 Ch. Div. 73, which we are unable to construe in his favor. It was a case where a father verbally promised, in contemplation of the marriage of his daughter, to give her a house as a wedding present, and immediately after the marriage he put the daughter and her husband into actual possession, and it was held that, the verbal promise to give the house having been established, the possession was a part performance which took the case out of the statute of frauds. There are many cases to the same effect. He also cites note 3, pp. 793-798, of 3 L. R. A. (N. S.) in support of his position; but we are unable to find in the cases cited in such note any authorities which we construe as even tending to sustain the claims of the plaintiff. They are to the effect that taking possession is part performance in such a sense as to take an oral contract of purchase and sale of real estate out of the statute of frauds. After an exhaustive examination of the authorities, we find no case holding, conceding that delivery of possession will take such a contract out of the statute, that anything less than actual physical delivery of possession is sufficient. On the contrary, we find a great number of cases holding that there must be a physical, visible change of possession; that the

change must be an admission of the purchaser into the possession of the land. It seems to be well established that possession taken under a tenancy prior to the contract sought to be enforced cannot serve, when such possession is continued after the contract, as an act of part performance, and there are many cases holding that in such case, if there is no visible change of possession, the occupancy of the premises by the purchaser is inadequate. See *Linn v. McLean*, 85 Ala. 250, 4 South. 777; *Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45; *Abbott v. 76 Land & Water Co.*, 101 Cal. 567, 36 Pac. 1; *Hutton v. Doxsee*, 116 Iowa, 13, 89 N. W. 79; *O'Brien v. Foulke*, 69 Kan. 475; *Messmore v. Cunningham*, 78 Mich. 623, 44 N. W. 145; *Williams v. Morris*, 95 U. S. 444, 24 L. Ed. 360; *Greenlee v. Greenlee*, 22 Pa. 225. It is also held that possession must not only be under the contract as a matter of fact, but it must be such as to be accounted for in no other way than by the oral agreement, and that, if it can as well be referred to something else, such an objection is fatal to the enforcement of the contract. *Andrew v. Babcock*, 63 Conn. 109, 26 Atl. 715; *Meigs v. Morris*, 63 Ark. 100.

Possession must be actual, open and notorious to serve as an act of part performance, and with such publicity as attends an open transfer of possession in such a way that the fact itself attests that the parties have bargained. *Hill v. Meyers*, 43 Pa. 170; *Shellhammer v. Ashbaugh*, 83 Pa. 28; *Cuppy v. Hixon*, 29 Ind. 522; *Myers v. Byerly*, 45 Pa. 368, 84 Am. Dec. 497; *Emmel v. Hayes*, 102 Mo. 186, 14 S. W. 209, 11 L. R. A. 323, 22 Am. St. Rep. 769. The Supreme Court of the United States has adopted a rule on this class of cases which seems to us to be salutary. It is at least in harmony with the decisions of the courts of most of the states that hold possession part performance. It says that the test in most cases is whether the party let into possession could have been treated as a trespasser in the absence of the parol agreement, and that, it not appearing that the antecedent relations of the defendant to the land in controversy in that case were changed by reason of the contract, and because it would appear that the only change that took place in fact arose from the plaintiff's withdrawal in favor of the defendant and from their refraining to prosecute an adverse claim, that case was not taken out of the statute, both parties in that case having been in possession; and the court holds that, in order to make surrender of possession to the defendant a

sufficient performance to take a case out of the statute of frauds, such surrender must be made in pursuance of the contract and be referable to it. It must be a new possession under the contract, and not merely the continuance of a former possession claimed under a different right or title. *Ducie et al. v. Ford*, 138 U. S. 587, 11 Sup. Ct. 417, 34 L. Ed. 1091. Numerous cases hold that specific performance will not be enforced of a parol contract for the sale of real estate by one partner to the other, where the only change of possession is the withdrawal of the vendor and the continuance of the vendee in possession; and the same rule is followed where the husband and wife are in possession, and one sells by oral contract to the other, without any visible change of possession. *Willmer v. Farris*, 40 Iowa, 309. The doctrine of delivery of possession constituting a part performance seems to have arisen, owing to the fact that to hold otherwise would constitute the purchaser in possession a trespasser, and the courts originally adopted this rule to avoid the hardship which would be occasioned the purchaser in case he was a trespasser.

We have considered this case out of its order, because our attention has been called to the fact that great hardship may be saved one of the parties by an early decision, and to this end we have not discussed the principles involved as fully as we might otherwise have done, but simply give the result of our examination of many authorities.

The judgment of the district court is affirmed. All concur.
(113 N. W. 1038.)

E. H. DREVESKRACHT v. FIRST STATE BANK OF BALFOUR.

Opinion filed Nov. 20, 1907.

Compulsory Reference — Long Account — What Showing will Warrant.

1. A compulsory reference of an issue under the provisions of section 7047, Rev. Code 1905, is not permissible unless it appears that the trial of such issue will necessitate the examination of a long account between the parties. It is not sufficient that it appears that the trial may involve the examination of a long account; but it must affirmatively appear that it will do so.

Same.

2. To authorize an order of reference upon the ground that the trial will require the examination of a long account within the meaning

of said statute, the account must be one arising between the parties, and must be directly, and not merely collaterally, involved in the trial.

Same.

3. Plaintiff seeks to recover a sum claimed to be due him for services performed under an alleged contract, by the terms of which he was to receive, in addition to a monthly allowance, 10 per cent of the net profits of defendant bank during his employment. The answer put in issue the terms of the contract, as stated in the complaint, and alleged that plaintiff was to receive 10 per cent commission on all net profits, over and above a 12 per cent dividend upon the defendant's capital stock, after charging off all losses and bad debts. The answer also alleged payment in full, and also contained the usual qualified denial of all allegations of the complaint not admitted, qualified or explained.

Held, that the issues thus raised did not justify the trial court in ordering a compulsory reference.

Appeal from District Court, McHenry county; *Goss*, J.

Action by E. F. Dreveskracht against the First State Bank of Balfour. Judgment for plaintiff, and defendant appeals.

Reversed.

Lee Combs, for appellant.

The account to be referred must be between the parties to the action; not between one and a third person. *Keller v. Payne*, 4 N. Y. S. 227; *Continental Ins. Co. v. Phoenix Ins. Co.*, 8 N. Y. S. 524; *Betcher v. Grant Co.*, 68 N. W. 163; *Ewart et al. v. Koss*, 95 N. W. 913; *Kelly v. Oksall*, 95 N. W. 915; *Williams v. Benton*, 24 Cal. 425; *Grim v. Norris*, 19 Cal. 140; *Clarkson v. Hoyt*, 36 Pac. 382; *Silmser v. Redfield*, 19 Wend. 21; *Camp v. Ingersoll*, 86 N. Y. 433; *Van Rensselaer v. Jewett*, 6 Hill, 373, 41 Am. Dec. 750; *Thomas v. Reab*, 6 Wend. 503; *Untermeyer v. Bernhauer*, 11 N. E. 847; *Thayer v. McNaughton*, 22 N. E. 562; *Wilson v. Union Distilling Co.*, 66 Pac. 170; *McMartin v. Bingham*, 27 Iowa, 234.

Only the issue as to the account can be referred. *Williams v. Benton*, *supra*; *Seaman v. Mariani*, 1 Cal. 336.

In equitable actions alone can compulsory reference be had; in actions at law, right of trial by jury cannot be violated. Con. of N. D., section 7, article 1; *Lamaster v. Scofield*, 5 Neb. 148; *Williams v. Benton*, *supra*; *Smith v. Polack*, 2 Cal. 92; *Grim v. Norris*, *supra*; *McMartin v. Bingham*, 27 Iowa *supra*; *Camp v. Ingersoll*,

86 N. Y. 433; District Township of Grant v. Bulles, 29 N. W. 439; Dacres v. Oregon R. & Nav. Co., 20 Pac. 601; Plimpton v. Somerset, 33 Vt. 283; Isom v. Miss. Cent. R. Co., 36 Miss. 300; St. Paul, etc., R. R. Co. v. Gardner, 19 Minn. 123.

Where the right of trial by jury existed, when a state constitution was adopted, statute authorizing compulsory reference in a law action is unconstitutional. Steck v. Colorado Fuel and Iron Co., 25 L. R. A. 67; Whallon v. Bancroft, 4 Minn. 109; Flanders v. Warner, 55 N. H. 179; McCullough v. Brodie, 13 How. Pr. 346; Townsend v. Hendricks, 40 How. Pr. 143; Tribou v. Strowbridge, 7 Ore. 156; Mead v. Walker, 17 Wis. 189; Edwardson v. Garnhart, 56 Mo. 81; Lee v. Tillottson, 24 Wend. 327, 35 Am. Dec. 624; Mathews v. Tripp, 12 R. I. 258; Francis v. Beker, 11 R. I. 103, 23 Am. Rep. 424; Perkins v. Scott, 57 N. H. 55, 17 Enc. Pl. & Pr. 994.

Turner & Wright, for respondent.

The statute does not restrict the account to one of debits and credits. Rev. Codes 1905, section 7047.

FISK, J. This is an appeal from an order of reference of all the issues arising on two causes of action in the complaint and two counterclaims contained in the answer; appellant assigning error in substance as follows: (1) That it was error to refer all the issues; (2) that there was no showing that an accounting between the parties was necessary, or that the action was a proper one for reference under section 7047, Rev. Codes 1905; (3) that section 7047 contravenes section 7 of the constitution, which guarantees trial by jury; and (4) that, conceding such statute to be constitutional, it merely authorizes references in cases formerly cognizable in courts of chancery.

The questions embraced in assignments 3 and 4 have been fully considered and disposed of in *Smith v. Kunert*, 115 N. W. 76, recently decided by this court; hence these assignments will not be further noticed. The view we take of this appeal renders a consideration of the first assignment also unnecessary, although it is practically conceded by respondent in his printed brief and argument that it was error to refer any of the issues except the one arising on plaintiff's first cause of action, the trial of which, it is contended by him, will involve the examination of a long account.

We will therefore turn our attention to appellant's second assignment, a proper consideration of which necessitates an examination of the issues framed by the pleadings of plaintiff's first cause of action. Do the pleadings disclose upon their face that the trial of such issue will require the examination of a long account upon either side? If not, then it is plain, as was held in *Smith v. Kunert*, supra, that the order appealed from was not authorized under the provisions of our Code (section 7047) relative to compulsory references. It is not contended that the order complained of was based on any showing aside from the pleadings themselves, that the trial of the issue would necessitate the examination of a long account.

Plaintiff's first cause of action is alleged in substance as follows: That plaintiff was employed by defendant between January 1 and November 15, 1902, at an agreed compensation of \$65 per month and 10 per cent of the net profits earned by plaintiff during such employment; that such net profits amounted to \$8,861, and that no part of such compensation other than the monthly salary had been paid. The answer admits such employment between the dates aforesaid, but alleges that the terms were a monthly salary of \$60 and 10 per cent commission on the net profits of defendant bank over and above a 12 per cent dividend upon the capital stock of said corporation after deducting all losses and bad debts. Then follows an allegation of payment in full for such services and an acknowledgment in writing by plaintiff of such fact, after which the answer contains a denial of each allegation in said cause of action, except as theretofore admitted, qualified or explained. It will thus be seen that the denial last mentioned is the only portion of the answer which in any manner tends to raise an issue, the trial of which may necessitate the examination of any account. But the fact that the trial of an issue of fact may require the examination of a long account is not alone sufficient to authorize a compulsory reference, but it must affirmatively appear to the court that the trial will necessarily require the examination of a long account. *Smith v. Kunert*, supra; *Ewart et al. v. Kass*, 17 S. D. 220, 95 N. W. 915; *Kelly v. Oksall*, 17 S. D. 185, 95 N. W. 913; *Andrus v. Home Insurance Co.*, 73 Wis. 642, 41 N. W. 956, 3 L. R. A. 271; *Thayer v. McNaughton*, 117 N. Y. 111, 22 N. E. 562. Furthermore, it must appear that the account to be examined is one directly involved and existing between the parties as distinguished from an account such as the one claimed to be involved

in the case at bar, arising between the defendant and third persons, and which at most is merely involved collaterally. *Camp v. Ingersoll*, 86 N. Y. 433; *Betcher v. Grant Co.*, 9 S. D. 82, 68 N. W. 163; *McAler v. Sinnott*, 30 App. Div. 318, 51 N. Y. Supp. 956; *Bank v. Werner*, 54 App. Div. 435, 66 N. Y. Supp. 996; *Cassidy v. McFarland*, 139 N. Y. 201, 34 N. E. 893; *Spence v. Sims*, 137 N. Y. 616, 33 N. E. 554; *Keller v. Payne*, 51 Hun. 316, 4 N. Y. Supp. 227; *Kain v. Delano*, 11 Abb. Pr. (N. S.) N. Y. 29. Nor does it necessarily appear from the pleadings that the trial will require a detailed examination of the entries in the defendant's books in order to arrive at its net profits. *McAler v. Sinnott*, *supra*.

The case last cited was an action to recover a balance claimed to be due plaintiff for services as manager of defendant's liquor business. Plaintiff's compensation consisted of commissions on the amount of sales. The answer denied that the plaintiff's services were worth the amount alleged in the complaint, and alleged that the plaintiff had been fully paid, except a certain sum named. Upon the pleadings and an affidavit by the plaintiff, an order of reference was made, and, in reversing such order, the Supreme Court, through Bartlett, J., said: "The proof that the examination of a long account will be required in trying the issues presented upon the complaint is very meager. The plaintiff's affidavit indicates that he will be obliged to introduce evidence of several hundred distinct and separate sales upon which his commission must be computed, and that he will also be compelled to give proof of the delivery of about 125 different bills of goods upon which he claims commissions. There is no statement or intimation, however, that the different items of this proposed evidence are to be separately litigated, or that they are to be laid before the trial court for any purpose, except as a basis for a computation of the amount due the plaintiff in case his construction of the contract of employment is sustained. To warrant a compulsory order of reference, however, facts must be disclosed 'from which the conclusion can be fairly drawn that so many separate and distinct items of account will be litigated on the trial that a jury cannot keep the evidence in mind in regard to each of the items, and give it the proper weight and application when they retire to deliberate upon their verdict.' * * * The pleadings and affidavits on which the order below was granted indicate that the controversy be-

tween the parties really turns, first, upon the terms and construction of the contract between them; and, secondly, upon the question whether the plaintiff has violated the contract as alleged in the counterclaim. They do not satisfy us that the trial will require any such examination of a long account as is necessary to justify a reference of the issues by compulsion. 'Trial by a referee is an exceptional mode of judicial procedure, and, when it is sought to coerce a suitor into submission to it, the burden is upon the party applying for a reference to show by satisfactory proof that the case is within the excepted class.' *Cassidy v. McFarland*, 139 N. Y. 201, 34 N. E. 893." See, also, the case of *Thornton v. Life Ass'n of America*, 7 Mo. App. 544, which was an action by the plaintiff to recover salary and commissions from defendant insurance company, and which is directly in point in the case at bar. The court, after referring to the statute, which is the same as ours, said: "But, though in an action the examination of an account between the parties is in its nature referable if the account be long, the mere fact that a long account is involved which may have to be examined to establish some issue in the action will not make a case referable without consent. The case must turn upon the adjustment of the items constituting the account. It was not the intent of the legislature, says Judge Bronson in *Dederick's Adm'r's v. Richley*, 19 Wend. (N. Y.) 110, to take away the right of trial by jury merely on the ground that the accounts and dealings of the parties might incidentally come in question. 'They intended to provide for those cases only where an account was directly involved in the issue, and where little was to be done beyond a proper adjustment of the dealings of the parties.' 'Though the quantity and value of the goods are necessarily involved,' says the court in *Freeman v. Insurance Co.*, 13 Abb. Pr. (N. Y.) 125, 'yet it can hardly be said that such a claim involves the examination of an account. An account of one party against another is a series of charges for goods sold, etc., and is not merely introduced in evidence for the purpose of estimating damages, but is the foundation of the action.'"

For the foregoing reasons, we are of the opinion that the order appealed from was erroneous; and the same is accordingly reversed. All concur.

(113 N. W. 1032.)

G. B. NYSTROM v. JOHN LEE.

Opinion filed Dec. 30, 1907.

Boundaries — Resurveys — Procedure.

1. Resurvey of lands must be in accordance with the laws of the United States and the instructions issued by the officers thereof in charge of the government land surveys. Rev. Codes 1905, section 2540.

Same — Quarter Section Corners.

2. The official instructions to United States surveyors for locating and relocating quarter section corners on interior sections require them to be established equidistant from section corners. Hence, in absence of other evidence, when one corner and the quarter corner are found, the lost section corner will be presumed to have been located the same distance from the quarter corner as the latter is found to be from the existing corner.

Same — Location of Section Corners — Presumptions.

3. When the northwest, northeast, and southwest corners of an interior section and the west and north quarter corners are found or established, and a point on a line run one mile due south from the northeast corner of the section is found to be just one mile east of the southwest corner, such point, in the absence of conflicting evidence, will be presumed to be the original southeast section corner, and the points midway between that point and the established corners the south and east quarter corners.

Same — Evidence — Harmless Error.

4. The rejection of certain evidence *held* to be error without prejudice under the circumstances of this case.

Appeal from District Court, Nelson county; *Fisk*, J.

Action by G. B. Nystrom against John Lee. Judgment for defendant and plaintiff appeals.

Reversed.

Skulason & Skulason, for appellant.

By practical settlement and location, parties may compromise a disputed boundary line. *Lecomte v. Toudouze*, 17 S. W. 1047; *Cox v. Dougherty*, 36 S. W. 184; *Simmons v. McInney*, 63 S. W. 92; *Brummel v. Harris*, 63 S. W. 497; *Hills v. Ludvig*, 24 N. E. 596; *Clayton v. Feig*, 54 N. E. 149; *Hastings v. Stark*, 36 Cal. 122; *St. Bede College v. Weber*, 48 N. E. 165; *Miller v. Mills Co.*, 82 N. W. 1038; *Sherman v. Hastings*, 46 N. W. 1084; *LeCompte v. Lueders*, 51 N. W. 542; *Flynn v. Glenny*, 17 N. W. 65; *Evans*

v. Kunze, 31 S. W. 123; Jones v. Pashby, 35 N. W. 152; Smith v. Hamilton, 20 Mich. 433; Jacobs v. Moseley, 4 S. W. 135.

In a dispute regarding a boundary line, any evidence which it is competent to use to prove a fact, is admissible. Radford v. Johnson, 8 N. D. 182, 77 N. W. 601; Gwynn v. Schwartz, 9 S. E. 880; Scott v. Yard, 33 S. W. 588; 5 Cyc. 930, 939; Coy v. Miller, 47 N. W. 1046.

All ascertained surrounding monuments shall have their due weight in determining the unascertained. Lemmon v. Hartsock. 80 Mo. 13; Frazier v. Bryant, 59 Mo. 121; Knight v. Elliott, 57 Mo. 317.

Unauthorized entry upon another's land is trespass. 28 Am. & Eng. Enc. Law, 551; Bouvier's Law Dictionary; 28 Am. & Eng. Enc. Law, 552; 3 Blackstone's Commentaries, 210; Pfeifer v. Grossman, 15 Ill. 53; Arneson v. Spawn, 49 N. W. 1066.

M. A. Shirley and Scott Rex, for respondent.

Original government monuments control; in their absence, their former location, if it can be definitely determined. Radford v. Johnson, 8 N. D. 182, 77 N. W. 601; Beltz v. Mathiowitz, 75 N. W. 699; Black v. Walker, 7 N. D. 414, 75 N. W. 787; Dowdle v. Cornue, 68 N. W. 194; Randall v. Burke Twp., 57 N. W. 4.

In their absence resort must be had to government field notes, starting from the nearest known government monuments. Beltz v. Mathiowitz, *supra*; Black v. Walker, *supra*; White v. Amrhien, 85 N. W. 191; McCray v. Elevator Co., 91 N. W. 457.

That a disputed boundary has been fixed by agreement or acquiescence must be shown by proof clear and convincing. Beardsley v. Crane, 54 N. W. 740; Cronin v. Gore, 38 Mich. 381; McKey v. Hyde Park, 37 Fed. 389; Dauer v. Hildebrandt, 68 N. W. 145.

Such acquiescence must be for the period of time fixed by the statute of limitations. Buchanan v. Ashdown, 24 N. Y. Supp. 1122; 5 Cyc. 942; Corning v. Troy Iron Works, 44 N. Y. 577.

SPALDING, J. The plaintiff is owner of the N. E. $\frac{1}{4}$ of section 27, in township 149 N., of range 57 W., in Nelson county, and the controversy in this case arises over the lines dividing the plaintiff's land from the S. E. $\frac{1}{4}$ owned, and the N. W. $\frac{1}{4}$ of the same section occupied, by the defendant. The action is brought for damages for trespass upon strips along the south and west sides, claimed by plaintiff to be a part of the N. E. $\frac{1}{4}$, and there-

fore belonging to him, but occupied some years by the defendant. One Gjedestad, the county surveyor of Nelson county, testified that at the request of the plaintiff he made a survey of the section; that after some preliminary surveying he found a government monument at the northwest corner of the section, and that one-half mile east and the same distance south of that monument he found government quarter section mounds. He testified that at the northeast corner of the section there had been a round slough, and there was a graded road running north and south on the east section line through this slough, but no grade east and west at that point. He found monuments on two sides of what had been this slough. He says: "I found at the northeast corner of the section what I thought or supposed was the section corner post or stone. There was one mound at the east side of the slough and one on the west side of it, so I had to start between them on the grade—half way between them. I thought they were original government mounds." An extension of the east and west line, east from the north quarter section monument one-half mile, brought him to this point exactly midway between these two mounds, and in the middle of the road. All other mounds were obliterated, and could not be found. He established the southwest corner of the section by extending the west line between the two monuments found on that line, one-half mile south of the west quarter monument. He located a point one mile east from the west quarter monument, and extended through that point a north and south line one mile south from the northeast corner, and from the south end of this north and south line, west to the southwest corner, he testified was one mile. He located the center of the section by running one-half mile south from the north quarter corner, and the same distance east from the west quarter corner, and west from the middle of the east line. He testified that he measured all the sides of each of the quarter sections, except on the south side of the section, and found them each one-half mile. The south line he did not divide, but it was one mile in length. After testifying as to the methods and means used to locate these lines and subdivide the section, and that he did not have the field notes of the government survey, but relied upon the monuments referred to, he was asked, "Now, how does that line running east and west divide the section, into what portions?" and the court sustained the defendant's objection to this question. He was later asked: "Now, how does this line that you

established, running east and west to the center of the section, or thereabouts—how does it divide the section as to fractions north and south?” An objection to this question was sustained, and he was not allowed to answer. During the trial the plaintiff offered to show by witness Gjedestad, that the line which he ran and established, from the government monument in the center of the west line of the section in question due east, subdivided the east half of the section into equal parts, so as to make 160 acres in the northeast quarter and 160 acres in the southeast quarter. The defendant objected to this proof, and the court sustained the objection. Proof was offered to show the amount expended by the plaintiff in surveying these lines, and defendant's objection to such proof was sustained. The court also sustained an objection to proof showing the value of the use of the land in dispute during the time the defendant occupied it, and also to an offer to show the rental value. These rulings of the court are each assigned as error. Testimony was given in an attempt to show acquiescence in the line established by the surveyor. At the close of the plaintiff's case both parties rested, whereupon the defendant made a motion for a directed verdict on the ground that no case had been made by the plaintiff, and the motion was granted, and on the direction of the court a verdict was returned for the defendant, upon which judgment was entered in his favor. From this judgment the plaintiff perfected this appeal.

In addition to the errors specified, which we have mentioned, error is assigned in the granting of the defendant's motion for a directed verdict, and in entering judgment dismissing the action. The courts of this state in matters of this kind are governed by the laws of the United States, and the instructions issued by the officers thereof, in charge of the public land surveys. Rev. Codes 1905, section 2540. Section 2395, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1471], among other things, provides that the public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square; that “the corners of the townships must be marked by progressive numbers from the beginning; each distance of a mile between such corners must also be distinctly marked with marks different from those of the corners;” that “the townships shall be divided into sections containing as nearly as may 360 acres each, by running through the same each

way parallel lines at the end of every two miles, and by making a corner on each of such lines at the end of every mile." It will be seen from this that the interior sections are required to be one mile square, and we think the court is justified in presuming, in the absence of evidence to the contrary, that they are so established. In the case at bar this presumption is strengthened by the fact that the north and west quarter section corner monuments were found to be each one-half mile from the established monument at the northwest corner of the section. It is further strengthened by the fact that, on extending the northern boundary line east from the quarter monument one-half mile, it was found to end at a point in the middle of the highway equidistant from the two mounds on the east and west sides of the ancient slough, and that the line running south from this point terminated one mile east of the southwest corner, thus making the three corners, on which none of the original monuments could be found, correspond with the location of the monuments before referred to, and each side of the section one mile in length. It is conceded that, in all cases where the location of the original monuments can be ascertained, they must control, and that the object of the resurvey is to locate, if possible, the original monuments. It is also well established that, in proving the location of lost or obliterated monuments, any evidence may be used which tends to establish the location of such monuments. 5 Cyc. 956. The testimony of the witnesses who have seen them and remember their location is competent. The use of the field notes made on the original survey is likewise competent, and, when used, they have the force of a deposition made by the surveyor. Although they would have been competent evidence, we do not consider the field notes as necessary evidence in this case. *White v. Amrhien*, 14 S. D. 272, 85 N. W. 191; *Randall v. Burke Township*, 4 S. D. 337, 57 N. W. 4; *Radford v. Johnson*, 8 N. D. 182, 77 N. W. 601; *Dowdle v. Cornue*, 9 S. D. 126, 68 N. W. 194; *Neary v. Jones*, 89 Iowa, 556, 56 N. W. 675.

Rule No. 147 of the Manual of Surveying Instructions, issued by the United States General Land Office, requires that in making surveys of public lands quarter section corners, both upon the meridional and latitudinal section lines, be established at points equidistant from the corresponding section corners, except (here follow exceptions which have no application to interior sections). The

instructions issued by the General Land Office March 14, 1901, regarding the re-establishment of interior quarter section corners, say: "The missing quarter section corner must be re-established equidistant between the section corners marking the line according to the fields notes of the original survey." We take this to mean that, when the section corners on any side of the section are found or located, the quarter corner must be placed midway between them. Conversely, it must be true that, when the northwest corner of an interior section and the quarter corner on the north line are found or located, and they are found to be one-half mile apart, the northeast corner of the section must at least be presumed to be one half mile east of the quarter corner, and the same rule must apply to the southwest corner of the section, when, as in this case, the northwest corner and the west quarter corner are one-half mile apart. If this rule is correct, as we think it must be, then, when the surveyor ran the east line one-half miles south from the northeast corner which he had established, and a line between that point and the quarter monument on the west line was found to be one mile in length, it must at least furnish prima facie evidence of the location of the original corners and boundaries. We think the evidence on this point was competent, and that the plaintiff did not have to resort to every known test to ascertain the correctness of the survey. It is held in several states that lost quarter posts should be relocated at equal distances between the section corners. *Hess v. Meyer*, 73 Mich. 259, 41 N. W. 422; *Frazier v. Bryant*, 59 Mo. 121; *Knight v. Elliott*, 57 Mo. 317; *Lemmon v. Hartsook*, 80 Mo. 13. A line marked part of the distance must be followed in the same direction for the whole distance unless there is some marked corner to divert it. *Thornberry v. Churchill*, 4 T. B. Mon. (Ky.) 29, 16 Am. Dec. 125; *George v. Thomas*, 16 Tex. 612, 67 Am. Dec. 612, and cases cited. Where boundaries and termini are is a question for the jury. *Doe v. Paine*, 11 N. C. 64, 15 Am. Dec. 507; *Comegys v. Carley*, 3 Watts (Pa.) 280, 27 Am. Dec. 356.

There was much more testimony showing how the surveyor verified his measurements and the points which he located. It all sufficed to show clearly that he had, as we have indicated, established the four corners of a tract of land one mile square, and the only question to be determined is whether this evidence sufficed to make a prima facie case for the plaintiff. The witness who testified had

been county surveyor for five years. Nothing appears to indicate that he was incompetent as a surveyor; but his use of the English language was quite imperfect, and the expressions used by him in testifying as to the location of the corners, it appears clear to us, meant more than the bare words indicated. His positive opinions were expressed in language peculiar to foreigners of some nationalities, who seldom use words indicating positiveness. Although, in our consideration of this matter thus far, we have assumed that he did not find, except by extending the north line east from the quarter mound, the northeast corner of the section, yet we are satisfied that the point regarding which he testifies, located in the middle of the grade of the road and midway between the two mounds, was the northeast corner of the section, and that he meant to be understood as giving his opinion that it was the original section corner which he found there. Old mounds, pits and stakes, having the appearance of government mounds, may be considered by the court and jury in determining whether or not they are the original government corners. If they are indistinct and the marking obliterated, but are found at points where they should have been located, they may furnish valuable evidence, while, if some distance from where it appears they should have been located, they furnish less valuable evidence of the original location of the corners. In this case there is no evidence of any corners, mounds or stakes, except at exact points where the measurements and extensions of known lines indicate they should be to conform to the law and the rules regarding the location of corners, and all the evidence in the case corroborates the testimony of the surveyor, although, as we have indicated, his language was somewhat ambiguous in locating these corners, and establishing the fact that such locations were original section or quarter corners. *Hanson v. Red Rock*, 4 S. D. 358, 57 N. W. 11.

We see no merit in the assignments of error on the rejection of the evidence regarding the relative portions into which these lines divided the section, because it is clear from the evidence received that the tract of land outlined was divided by this survey into four equal quarters, so, if it was error to sustain the objections to this testimony, the only purpose of which must have been to make it more clear and distinct to the jury, it was error without prejudice. We see no ground for complaint that evidence was not received showing the cost of the survey, as we are unable to find

any statutory provision for apportioning the cost; but the plaintiff, having made a *prima facie* case, should have been allowed to show damages from the use of his land by the defendant. The land so used was a strip on the west side of the N. E. $\frac{1}{4}$, 171 feet wide at the center of the section and tapering to a point at the north quarter monument, and another strip about ten feet wide at the center of the section and about twelve feet wide at the east end, on the south of the northeast quarter, as well as a small strip used for a road. The evidence showed that the defendant was present for brief periods when the survey was being made, and indicated to the surveyor that he acquiesced in the result. No agreement between the parties is shown that the lines established by the surveyor should stand as their division lines; but it is argued that in his acquiescence and in his conversation with the surveyor, and the fact that a short time before this survey was made, and after a preceding survey by another surveyor, who had located the lines in practically the same place, he had moved his fence to correspond with the lines, constitutes such acquiescence as to be binding on the defendant. We are of the opinion that this point is not well taken. It requires acquiescence in a survey of this kind for a much longer period than is shown in the case at bar. Some cases hold that recognition of the lines for a considerable period, although less than the period which would be a bar under the statute of limitations, is sufficient to estop a party. *Cavanaugh v. Jackson*, 91 Cal. 580, 27 Pac. 931. Other authorities hold it insufficient unless for the statutory time. However, it is unnecessary in this case to decide how long this time should be, as we find no facts disclosed which, in our opinion, warrant holding the defendant bound by his acts in the premises.

We are of the opinion that the plaintiff made a *prima facie* case, and that the court erred in directing a verdict for the defendant. If the defendant was able to submit evidence showing that the surveyor had been in error in his measurements or in identifying the corners, he should have offered it; but on a directed verdict the evidence of the opposite party is to be taken as undisputed, and is entitled to the most favorable construction that it will properly bear, and he is entitled to the benefit of all reasonable inferences arising from his testimony. *Pirie v. Gillitt*, 2 N. D. 255, 50 N. W. 710.

The judgment of the district court is reversed, and a new trial granted, for the purpose of assessing such damages as plaintiff may show himself entitled to recover. All concur.

FISK, J., disqualified, and HON. CHAS. A. POLLOCK, judge of the Third judicial district, sat by request.
(114 N. W. 478.)

THE STATE OF NORTH DAKOTA EX REL. VINCENT BOCKMEIER, v.
FRED L. ELY, SHERIFF OF PIERCE COUNTY.

Opinion filed Nov. 7, 1907.

Judges — De Facto Officers — Validity of Acts.

1. A person acting and recognized by the public as judge of the district court of a county in a new district, before the law establishing such new district has become operative, by appointment of the governor, under the erroneous belief that the new district was already in existence, is judge de facto, and his acts in that capacity valid as to third persons and the public.

Same.

2. Laws were passed defining the boundaries of the Ninth judicial district and increasing the number of judicial districts from 8 to 10. These laws took effect March 23, and July 1, 1907, respectively; but, by reason of conflicting provisions therein, the date when the new district should come into existence could not be ascertained from the face of the laws. The governor construed them as creating the new district on the 1st day of July, 1907, and appointed a judge thereof, who duly qualified and entered upon the discharge of the duties of judge of such district on or about July 1, 1907, in good faith, and the judges of the Second and Eighth districts ceased to perform judicial duties in the counties which will compose the Ninth district. From an inspection of that part of the journals of the legislative assembly showing the proceedings on the passage of these laws, this court has determined that the intent of that body was that the new laws creating the new district and defining its boundaries should be held in abeyance until the election and qualification of a judge as therein provided. *Held*, that the person so appointed judge, and acting and recognized as such, was a judge de facto, and his official acts valid.

Habeas Corpus — Conviction Under De Facto Judge.

3. On application for writ of habeas corpus by a person convicted and sentenced at a term of court held by such appointee, and now imprisoned under the judgment rendered therein, *held*, that relief cannot be granted and the application must be denied.

Application by the state, on the relation of Vincent Bockmeier, for a writ of habeas corpus to Fred L. Ely, sheriff of Pierce county.

Writ denied.

A. M. Christianson and Edward Engerud, for relator.

Scott Rex and E. A. Coger and Purcell & Divet, for respondent.

SPALDING, J. This is an application on behalf of the relator for a writ of habeas corpus to release him from imprisonment under conviction for a criminal offense in the district court of Pierce county in August last, while Hon. A. G. Burr was acting and presiding as judge of such court. The facts are stipulated, and it is stipulated that the matter be disposed of upon petition for writ of habeas corpus, and that, if on the hearing this court shall determine that the petitioner is entitled to his release, the writ shall issue forthwith, and that, if this court shall determine otherwise, then its denial of such writ shall be taken as final in this proceeding.

The petition, among other things, alleges the organization and existence of the counties of McHenry, Pierce and Bottineau; that the relator is a resident of the county of Pierce, which is a part of the Second judicial district; and that one John F. Cowan is the duly elected, qualified and acting judge of said Second judicial district. It also sets forth the passage of an act of the legislature defining the boundaries of the Second, Eighth and Ninth judicial districts of the state of North Dakota, which was approved on the 23d day of March, 1907, and also of an act dividing the state into ten judicial districts, approved on the same day, the former taking effect March 23, and the latter July 1, 1907, and that on or about the 1st day of July, 1907, the governor of the state of North Dakota appointed A. G. Burr judge of the pretended Ninth judicial district, and issued to him a commission as judge in due form, and that thereafter, and on or about the 1st day of July, 1907, said Burr qualified as judge of said pretended Ninth judicial district, and since such appointment and qualification has performed the functions of district judge within said Ninth judicial district, and is now acting as such.

In the case of State of North Dakota ex rel. Henry Erickson, plaintiff, v. A. G. Burr, defendant (N. D.) 113 N. W. 705, a direct proceeding to oust the defendant from such office, decided at this

term, we have held that the appointment of said Burr to the office of judge of the Ninth judicial district was illegal, for the reason that such district does not come into existence until the judge elected at the general election in 1908 qualifies. The only question to be determined in this proceeding is whether said Burr was, at the time of the conviction and pronouncing of judgment upon this relator, judge *de facto*. It is assumed that, if he was a *de facto* judge at such time, his official acts in that capacity are valid as to third persons and the public. Having quoted the two acts of the legislature in question in full in the former opinion, it is unnecessary to do so here.

The books are full of cases attempting to define a *de facto* officer; but it is generally conceded that no precise definition can be given fitting all cases, and that each case must be determined largely upon its own facts. We have carefully examined a great number of authorities on this subject, and, as to the reason for courts holding officers illegally in possession of an office officers *de facto*, and their acts valid, find that the statement of this doctrine most generally accepted is contained in *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574, where the court says: "The principle established in these cases in regard to the proceedings of officers *de facto*, acting under color of title, is one founded in policy and convenience, is most salutary in its operation, and is, indeed, necessary for the protection of the rights of individuals and the security of the public peace. The rights of no person claiming title or interest under or through the proceedings of an officer having an apparent authority to act would be safe if he were obliged to examine the legality of the title of such officer up to its original source, and the title or interest of such person were held to be invalidated by any accidental defect or failure in the appointment, election or qualification of such officer, or in the rights of those from whom his election or appointment emanated. Nor could the supremacy of the laws be maintained, or their execution enforced, if the acts of the officers having a colorable but not a legal, title, were to be deemed invalid. If the act of the justice issuing a warrant is to be invalid on the ground of the objection there made, all persons who would act in the execution of the warrant would act without authority. The constable who arrests and the jailer who receives a felon would be each a trespasser. Resistance to them would be lawful. Everything done

by either of them would be unlawful, and the constable or the persons aiding him might in some possible instance become amenable even to a charge of murder for acting under an authority which they reasonably considered themselves bound to obey, and the invalidity whereof they were wholly ignorant." So it is held in all but three or four courts of this country that the acts of a de facto officer are valid as to third persons and the public, and by "third persons" is meant those persons having business of an official character with such officer, and not third persons in the usual legal sense in which the term is used. This court has already followed the rule of the great majority in holding that there can be a de facto officer whose official acts will be valid. *Cleveland v. McCanna*, 7 N. D. 455, 75 N. W. 908, 41 L. R. A. 852, 66 Am. St. Rep. 670.

The leading American case on the subject of de facto officers, containing a definition of that officer which has been almost universally accepted as the most accurate and comprehensive of any given, is *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, and in the opinion in that case the authorities are reviewed. Chief Justice Butler furnishes a definition which he says is sufficiently accurate and comprehensive to cover the whole ground. He says: "An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised: First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be; second, under color of a known or valid appointment or election, but where the officer has failed to conform to some precedent requirement or condition, as to take an oath, give a bond or the like; third, under color of a known appointment or election, void, because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public; fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such." The Supreme Court of North Carolina, in *People v. Staton*, 73 N. C. 546, 21 Am. Rep. 479, defines a de facto

officer as one who goes in under color of authority or who exercises the duties of the office so long or under such circumstances as to raise a presumption of his right.

One of the earliest definitions was given by Lord Ellenborough, as "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." It seems to have originally been held that there must be color of title for the appointment; but Throop, in his work on Public Officers, at section 626, says that the more recent decisions recognize a broader rule, and tend to hold that actual possession of the office, without regard to the mode in which possession was acquired, unless, perhaps, where it was by forcible usurpation, suffices to constitute the incumbent an officer *de facto*, and he collates the cases conflicting with the doctrine that color of title is needed at page 589 of that work, and maintains that it is color of authority, instead of color of title, which distinguishes a *de facto* officer from a mere intruder, and says that color of title is a very different thing from color of authority, and that the former expression implies that the person must be in by virtue of an election or appointment which is at least colorable. We are disposed to think that the terms "color of title" and "color of authority" have been used in most cases without discrimination or distinction. McCrary on Elections, section 253, defines "color of authority" as authority derived from an election or appointment, however irregular or informal, so that the incumbent is not a mere volunteer. If color of authority, as used and defined, is all that is necessary, Mr. Burr clearly had color of authority, because he possessed a commission as judge of the Ninth judicial district, issued in due form by the governor of the state of North Dakota, the authority which, if there had been a Ninth judicial district legally in existence and a vacancy in the office of judge of that district, would have had the appointment of a person to fill the vacancy. If color of title to the office is necessary, we think, under the definitions of color of title, he was an officer *de facto*. Color of title to the office is defined in *Re Ah Lee* (D. C.) 5 Fed. 899, as analogous to color of title to land, and Judge Deady says, in the opinion in that case, which is exhaustive: "The latter does not mean a good title, or even a defective conveyance from one having a title, but only the appearance of title; that is, a deed to the premises in due form of law."

It would be a useless task to attempt to collate the vast array of authorities on this question, or even to discriminate between those which conflict. We shall therefore content ourselves with citing a few which appear to run on lines nearly parallel with this case. Nearly all of the courts of the different states have held that an appointment to office under an unconstitutional law makes the appointee an officer de facto, until he is ousted by quo warranto proceedings, or the law is adjudged unconstitutional. *Am. & Eng. Enc. Law*, vol. 8, p. 793, note 6; *Throop on Public Officers*, p. 602. We are at somewhat of a loss to distinguish in principle between a case where the law under which an officer was appointed was unconstitutional and void, and one where, as in this case, the law was honestly misconstrued by the governor, the appointing power, and his appointee performed the functions of the office before the law creating the district went into operation. The acts of the legislature were so carelessly drawn, and the various sections so conflicting, that on the face of them any officer may well have been justified in construing them as immediately creating a district, and we are not certain that it was the duty of the governor to go behind the face of the law. We are of the opinion that on the face of these laws, under ordinary rules of construction regarding statutes containing conflicting provisions, when construed together, they might properly have been held to bring a district immediately into existence on their taking effect; but, as will be noted from an examination of the opinion in the quo warranto proceedings, we went to the journals of the senate and house to ascertain the intent of the legislature in the premises, and only from an inspection of the proceedings of that body were we able to arrive at this intent. If a commission issued by a person who under certain circumstances would have the right to issue it constitutes color of authority or right, then the commission held by Burr must be color of authority or right, because it was in legal form, and issued by the official having authority to appoint under certain circumstances.

It is held by several authorities that one who is in possession of an office, and claiming under color of appointment thereto, may be an officer de facto, when such office can only be lawfully filled by election, and the officer filling the office, which can only be legally filled by appointment, may be an officer de facto, though elected. *Chicago, etc., R. R. Co. v. Langlade County*, 56 Wis. 614.

14 N. W. 844; *In re Ah Lee* (D. C.) 5 Fed. 899, 16 Sawy. (U. S.) 410; *Goodwin v. Perkins*, 39 Vt. 598.

It is held that an officer in possession of an office, although appointed by a body without authority to make the appointment, is an officer *de facto*. In *Brown v. O'Connell*, 36 Conn. 432, 4 Am. Rep. 89, a person appointed judge by the common council of a city under a law providing for the appointment being made by that body was a judge *de facto*, although the constitution required the judges of all courts to be appointed by the general assembly. In *Ray v. Murdock*, 36 Miss. 692, the court held a person commissioner *de facto* who had received his appointment from a board which had power under certain circumstances to appoint a commissioner, and which had made this appointment when those circumstances did not exist.

In *McLean v. State*, 8 Heisk. (Tenn.) 22, tax assessors appointed by the board of county commissioners, although such appointments could only be made by the county court, were held to be *de facto* officers. 8 Am. & Eng. Enc. Law, p. 729, note 1.

Brady v. Howe, 50 Miss. 607, is a strong authority. The governor appointed a person to the office of judge, who entered upon the exercise of the duties of the office. Although the governor had no legal authority to make the appointment, for the reason that the office was filled by one whom the governor had no power to remove, it was held that the appointee of the governor was an officer *de facto*.

In *Smith v. Lynch*, 29 Ohio St. 261, we find a case where a village council passed an ordinance establishing a board of health, and appointed members of the board; but the ordinance establishing the board was not legally passed, and was therefore void, and it was held that such officers, on accepting office, became *de facto* officers, and their acts as such binding and valid.

In *Nichols v. MacLean*, 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730, it was held that the appointee of the mayor to the office of police commissioner of the city of New York, when no vacancy existed in the office, was an officer *de facto*.

In *Diggs v. State*, 49 Ala. 311, the court held that a solicitor *pro tem.*, appointed by the circuit court when there was no vacancy, and who accepted the appointment, was a county officer *de facto*. See this case for collection of authorities holding a vacancy not necessary to create a person acting under color of authority a *de facto* officer.

In *People v. Roberts*, 6 Cal. 214, the court held that a sheriff appointed by a judge of the county court, admitting such appointment to be void, was a *de facto* officer, and his acts good.

In *State v. Bloom*, 17 Wis. 521, it was held that, if a party is convicted and sentenced at a term of court held by a person exercising the office of judge of such court under appointment of the governor and without authority of law, there being no person entitled to exercise said office, the sentence is nevertheless valid and binding as against collateral attack by habeas corpus.

In *Merchants' National Bank v. McKinney*, 2 S. D. 106, 48 N. W. 841, the Supreme Court of that state had before it a question as to the validity of the acts of county commissioners and their appointees. The law provided for the organization of a county containing fifty or more legal voters. The governor acted in good faith on a petition containing the names of nonresidents, when in fact there were not more than twenty legal voters in the county, and he appointed commissioners, who in turn appointed county officers, and it was held that they were all *de facto* officers, and that their acts were binding and valid as to the public and third parties.

In *re Ah Lee* (D. C.) 5 Fed. 899, is an important case. The opinion is by Judge Deady. The constitution of Oregon authorized the legislature to provide by election for separate judges of the Supreme Court and circuit courts, when the population of the state should equal 200,000. In 1880 the legislature passed an act providing for the election of such judges at the general election in June, 1880, and that the governor should appoint such judges in the meantime, which was done. It was admitted that the population was not 200,000, and that such act was unconstitutional, and the appointments by the governor invalid. The constitution authorized the selection of such judges by election, and Judge Deady held that the judges acting under such appointments were judges *de facto*, and in the course of his opinion says: "A person actually in office by color of right or title, not a mere usurper or intruder, although not legally appointed or elected thereto, or qualified to hold the same, is still an officer *de facto*."

The legislature of Massachusetts created a new county and the officers thereof, and the governor appointed such officers before the law went into effect; and in *Fowler v. Bebee*, 9 Mass. 231, 6 Am. Dec. 62, it was held that the persons appointed were *de facto* of-

ficers, although the appointments were afterward declared void by the same court. To the same effect, see *Com. v. Fowler*, 10 Mass. 291.

In *McGraw v. Williams*, 33 Grat. (Va.) 510, a person elected as judge and commissioned as such entered upon the duties of the office in the belief that his term commenced immediately, and he was held to be a *de facto* officer, notwithstanding that his term did not legally commence until a considerable later date, and his predecessor's term had not expired.

In *re Boyle*, 9 Wis. 264, the validity of the acts of a municipal court was in question. At the time of the election of the judge and clerk of that court, the law establishing such court was not in effect; but the officers so elected entered upon the discharge of their duties as if the law had been in force, and it was held that they were officers *de facto*. In *re Burke*, 76 Wis. 357, 45 N. W. 24, was a case where the legislature passed an act establishing a municipal court of the city and county of Ashland, and provided that the judge of said court should be elected the first Tuesday of the April following, and to hold office from the first Monday in January thereafter. On the day designated the judge was elected, and two days later the same person was appointed by the governor to hold office until the first Monday in January following. It was held that after the appointment was made until the first Monday of January following the judge was a judge *de facto*.

In *Carleton v. People*, 10 Mich. 250, we find a case where a new county was created, and the act of the legislature creating it provided for an election before the taking effect of the law. The election was held at the time designated, and the county officers elected immediately qualified and assumed the duties of their respective offices, and it was held that, where there are offices, all that is required to make officers *de facto* is that the individual claiming office be in possession of it, performing its duties, and claiming to be such officer under color of election or appointment as the case might be.

It was held that when the legislature passed an act changing the boundaries of a judicial circuit but did not increase the number of circuits, and therefore did not increase the number of judges, and that portion of such law that provided for the election of the circuit judges was not authorized by the constitution, and the election itself was void, it gave the judge so elected and acting under

his election color of office, and that his acts while so acting were valid, although there was another judge in the office at the same time. *People v. Bangs*, 24 Ill. 184.

The legislature of Alabama created a judicial circuit and the office of judge thereof by an unconstitutional and void statute, but independently of the statute there was in a certain county a circuit court for that county and a circuit judge. The judge commissioned by the governor under the void statute attempted to exercise the duties of the office of circuit judge of the county in question, and it was held that he was an officer *de facto*, and his acts valid. *State v. Judge of Eighth Judicial Circuit*, 142 Ala. 87, 38 South. 835, 110 Am. St. Rep. 20. See, also, to same effect, *Walker v. State*, 142 Ala. 7, 39 South. 242.

Turney, Administrator, v. Dibrell, 62 Tenn. 235, is a case which seems to us directly parallel to the case at bar. The question involved was the validity of the appointment of Dibrell as clerk and master of the chancery court at Sparta, and the regularity of certain proceedings. It appears that in 1870 one Ward was elected chancellor, and that his election was contested, and pending the contest the governor of the state assumed that a vacancy existed, and commissioned one Goodpasture as chancellor, and he assumed the duties and the functions of the office, and appointed Dibrell clerk and master. The validity of the appointment of Dibrell as clerk and master depended upon the legality of the appointment of Goodpasture as chancellor. The court held that, if Goodpasture was chancellor *de jure* or *de facto*, he might rightfully make the appointment of a clerk and master. It was insisted that no vacancy existed, the contested election not leaving a vacancy in contemplation of the law, which authorized the governor to make the appointment, and this was admitted. But, notwithstanding these facts, the court held the appointee of the governor was chancellor *de facto*, and his acts as such were valid, for the reason that the governor had the power to appoint a chancellor in certain contingencies, and, if he appointed upon the assumption of the existence of the circumstances which authorized the act, his appointee took the office under color of title, and his acts were valid as an officer *de facto*, or as one exercising the functions of the office under the forms of law and color of title, and this notwithstanding the fact that the former chancellor held over.

It is strenuously argued that there could be no judge *de facto* in this instance because there was no office—that there was no Ninth judicial district. There was the office of judge of the district court, and this office was created by the constitution, and this is all that was necessary to put into operation the rules of law applicable to *de facto* judges, if the circumstances were such, aside from this, as to make those rules applicable. Several of the cases cited above are to the effect that officials, who have been appointed or elected and have gone into office before the law creating the office or district went into effect, were nevertheless *de facto* officers, and their acts as such were valid. In this case the law creating ten districts went into effect July 1, 1907, and the law defining boundaries of the Ninth district March 23, 1907; but they were not to go into operation, as we have held in the other case, until after the election of a judge in 1908 and his qualification. We think the principles applied in the similar cases, *supra*, are applicable here; and, as we have before stated, we see no distinction in principle between the case at bar and the many cases where the acts of an officer holding under an unconstitutional act of the legislature have been held valid.

But after careful consideration we are of the opinion that from another and different standpoint there was an office which this appointee filled. The constitution provides for courts to be presided over by a judge elected by the voters of a number of counties, called a "district." The word "district" is used to distinguish this class of courts from the supreme and other classes of courts, and likewise to designate the territory over whose courts the particular judge shall preside. In each district there may be a number of counties, and in no district are there less than two. It requires no act of the legislature providing for a new judge where the number of districts is increased. On an increase in districts being made, the number of judges is automatically increased to correspond. *People v. Dubois*, 23 Ill. 547; *People v. Bangs*, 24 Ill. 184. The judge does not alone constitute the court. It takes, not only the judge, but also the subordinate officials and all the machinery, to make a court. The courts are county—not district—affairs. All the officials, except the judge, are elected by the county, and the county furnishes all the machinery. The state pays the salary and the expenses of the judge, but the county pays the other expenses, and the judge, while presiding in a designated

county, is presiding over the court of that county, and not of the district. A county in one district has no more relation to another county in the same district than it has to any other county in some other district, except that it helps to elect the same judge.

Pierce county, although legally a part of the Second judicial district, had a court of its own, and any judge presiding at a term of that court was presiding over the district court of Pierce county. The governor had the power to appoint under certain circumstances. He misjudged as to the existence of the circumstances. The judges of the Second and Eighth districts, from parts of which the Ninth was to be created, misjudged the same circumstances in the same way, and surrendered possession of the office of judge of the district court in the three counties composing the new district, and that office was unfilled, except as occupied by Burr. To this office Burr was appointed, and, after qualifying, assumed the duties. To the public he was judge of the courts of those counties, and possessed all the indicia of office. All parties concerned acted in good faith, and the public acted in good faith in recognizing him as the officer he claimed to be and believed he was. All the reasons given in *Plymouth v. Painter*, *supra*, for courts recognizing the existence of an officer *do facto* exist in this case. Criminals have been tried and sentenced, civil actions have been tried and judgments entered, expenses incurred by individuals and counties, he has performed the marriage ceremony, and, if his acts are void as those of an intruder or usurper, innumerable complications, hardships and public injury will result. The whole doctrine of *de facto* officers is intended to avoid these things. If any doubt exists as to the legality of his acts, the public—the party most interested—is entitled to the benefit of those doubts. We are of the opinion that there was an office, that he filled it under color of authority, and that his official acts as to third persons and the public are valid.

The application is denied. All concur.

(113 N. W. 711.)

STATE OF NORTH DAKOTA EX REL. HENRY ERICKSON V. A. G. BURR.

Opinion filed Nov. 6, 1907.

Statutes — Constitutional Law — Title of Acts — Judicial Districts.

1. The title to chapter 161, p. 255, Laws 1907, being an act "defining the boundaries of the Second, Eighth and Ninth judicial districts of the state of North Dakota and providing for terms of court in said district," does not contravene the provisions of section 61, art. 2, of the constitution, requiring that the subject of the act shall be expressed in the title, although the act provides that the judge for the Ninth district shall be elected at the general election of 1908, and that until such election the territory comprising said district shall be and remain a part of the judicial district to which it belongs under existing laws.

Supreme Court — Original Jurisdiction — Consent of Attorney General — Private Relator.

2. Where the governor of the state appoints a judge of the district court under a law providing that the office shall be filled by a general election, and a private relator applies for leave to file an application for a writ in the nature of a writ of quo warranto, on the ground that he has suits pending of strictly personal nature, and that the public are interested and that the sovereignty of the state is affected, this court will assume original jurisdiction under section 87, art. 4, of the constitution, although the attorney general refuses to consent that said private relator may apply for leave to file the application for such writ in the name of the state.

Statutory Construction.

3. In construing statutes, the great aim of courts should be to give effect to the intent of the legislature in the enactment of each provision of the law.

Same — Contradictory Provisions.

4. In ascertaining what the legislative intent is, inharmonious and contradictory sections should be harmonized and made effectual if it can be done under reasonable rules of construction, and no section or utterance should be nullified if it can be given effect by such rules.

Same — Resort to Legislative Journals.

5. In determining what the legislative intent was in passing a law that is ambiguous in its terms, the journals of the legislature may be read in order to correctly ascertain such intention.

Same.

6. In determining what the legislative intention was in passing a law whose provisions are contradictory on its face, the fact that the journal shows that a positive provision, contradictory of a provision

stricken out, was inserted in the act by an amendment adopted as the last act before it was passed by one body, will be accepted as controlling of the intent, and the seemingly contradictory provisions left in the act will be disregarded and deemed to be in the law through inadvertence.

Application by the state, on the relation of Henry Erickson, for a writ of quo warranto against A. G. Burr.

Writ granted.

Edward Engerud and A. M. Christianson, for plaintiff.

Scott Rex, A. E. Cogger and Purcell & Divet, for defendant.

MORGAN, C. J. This is an application by a private relator for leave to file an information in the nature of quo warranto against the respondent, A. G. Burr, who is charged with unlawfully acting as judge of the district court of the Eighth judicial district. An order to show cause was issued by this court on August 10, 1907, why such leave should not be granted, and on the return day thereof the relator and the defendant appeared and arguments were duly presented in favor of the right, necessity, and duty of this court to grant such leave and in opposition thereto.

The facts leading up to the application are as follows: On March 23, 1907, chapter 161 (page 255) of the Laws of 1907 was duly approved by the governor, which was an act passed with an emergency clause defining the boundaries of the Ninth judicial district. On July 2, 1907, the governor of the state appointed the respondent judge of the district court of said district, who took the oath of office and entered upon the discharge of the duties of the office at once. On behalf of the relator, it is contended that the appointment was in contravention of the provisions of said law, and consequently illegal, null, and void. The respondent claims that his appointment was pursuant to such law, and therefore valid. In order to properly dispose of these contentions, it will be necessary to state the provisions of the law under which said appointment was made. Section 1 enumerates the counties of which each of said districts shall be composed, and prescribes that the Ninth district shall consist of the counties of Bottineau, McHenry and Pierce. Section 2 is as follows: "All actions brought and now pending in the counties of Bottineau, McHenry and Pierce shall be continued in and tried in the Ninth judicial district. The court on its own motion shall direct and authorize said actions

to be entitled in the Ninth judicial district, and any judgments rendered thereon shall be in full force and effect in said district." Section 3 provides for the holding of terms of the district court in each of said districts; and further provides as follows: "Any terms of court now called by the presiding judges of the Second and Eighth judicial district shall be duly held unless continued by the judge of the Ninth judicial district for cause." Section 4 is as follows: "There shall be chosen a judge of the district court for the Ninth judicial district at the general election to be held in November, 1908, and thereafter as provided by law." Section 5: "Until the election and qualification of the judge of the Ninth judicial district as herein provided for, all of the territory comprehended in said Ninth judicial district shall be and remain a part of the judicial district to which it belongs under existing laws." Section 6 repeals all acts or parts of acts in conflict with the act in question. Section 7 is as follows: "An emergency exists in this that the population and judicial business in the Second and Eighth judicial districts of the state have grown so large that the judges of said districts cannot give proper attention thereto, therefore this act shall take effect from and after its passage and approval." On March 23, 1907, chapter 159 (page 254) of the Laws of 1907 was approved by the governor of the state. This law was an amendment of section 468 of the Revised Codes of 1905, and provided that the state shall be divided into ten judicial districts, and that terms of court should be held in each district as provided by law, and that a judge of the district court shall be elected in each of said districts, whose term of office shall be four years from the first Monday in January next succeeding his election and until his successor is elected and qualified. No emergency clause was enacted with this act. Hence it did not go into effect until July 1st following its approval.

The respondent contends: (1) That this court should not take jurisdiction and grant the writ, for the reason that the facts do not bring it within the contemplation of section 87, article 4, of the constitution; (2) that sections 4 and 5 of the law under which the appointment was made are unconstitutional, for the reason that the subject of their provisions are not expressed in the title of the act; (3) that said law remains a complete and valid law without sections 4 and 5, and is authority for the immediate appointment of a judge for the district; (4) that it was the intent of the legis-

lative assembly that a judge should be appointed on July 1st, even if sections 4 and 5 be not unconstitutional. To these questions we will now endeavor to apply legal principles for their correct interpretation, mindful of the grave, important, and far-reaching results of our decision.

At the hearing the jurisdiction of this court to entertain original jurisdiction of this proceeding was not seriously denied, but in a written brief subsequently filed it is ably contended that leave to apply for a quo warranto writ should be denied, for the reason that the facts do not bring the application within the purview of section 87, article 4, of the constitution. That section is as follows: "It [Supreme Court] shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction, and shall have authority to hear and determine the same." If the attorney general, ex officio, had consented that this relator might apply for this writ, no serious question could be raised in opposition to granting such private relator leave to institute the proceedings. The attorney general having refused to give his consent to the application on behalf of a private relator, a different question is presented, that has not hitherto been presented to this court under parallel facts. The relator bases his right to file an information in the nature of quo warranto upon facts stated in his preliminary affidavit, substantially as follows: That he is a party to several actions now pending in the courts of Pierce and McHenry counties, and is a resident and large taxpayer of McHenry county, and that the respondent as judge threatens to assume jurisdiction on the trial of said causes, and that his acts in relation to said causes will be null and void, and will result in damage to him and multiplicity of suits, and that the sovereignty of the state is affected. The fact that the attorney general refuses to apply for the writ may have great weight with the Supreme Court in determining whether it will assume jurisdiction; but the fact of such refusal of itself will not be given controlling effect when considered in connection with the facts on which the application is based. The writ may be granted when he refuses to apply. It is ultimately for the court to determine whether jurisdiction should be assumed. The recommendation or action of the attorney general, who is the representative of the state in all matters of a legal nature, should always be given grave con-

sideration, but his action will not alone be the guide whether the court should exercise its jurisdiction. The writ is not demandable as a matter of right in any case by a private relator, but is issued as a matter of discretion, after weighing all the facts together with the attitude of the attorney general in reference to the particular case under consideration. The general rule is that this court will take jurisdiction in matters of great public concern—matters affecting the sovereignty of the state. “The Supreme Court shall have and exercise appellate jurisdiction only, except when otherwise specially provided by law or the constitution. The Supreme Court has power in the exercise of its original jurisdiction to issue writs of habeas corpus, mandamus, quo warranto, certiorari and injunction. * * * Provided that said court shall exercise the said original jurisdiction only in habeas corpus cases and in such cases of strictly public concern as involve questions affecting the sovereign rights of the state or its franchises or privileges.” Section 6751, Rev. Codes 1905.

In *State v. Nelson County*, 1 N. D. 88, 45 N. W. 33, 8 L. R. A. 283, 26 Am. St. Rep. 609, this court said: “When the information makes out a prima facie case, the writ will issue only in cases of publici juris, and those affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of the people. In such cases the court will judge for itself whether the wrong complained of is one which demands the interposition of this court.” In *State v. Archibald*, 5 N. D. 359, 66 N. W. 234, this court approved of the following rule: “But it would be straining and distorting the notion of prerogative jurisdiction to apply it to every case of personal, corporate or local right where a prerogative writ happens to afford an appropriate remedy. To warrant the assertion of original jurisdiction here, the interest of the state should be primary and proximate, not indirect or remote, peculiar, perhaps, to some subdivision of the state, but affecting the state at large in some of its prerogatives, raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state in its sovereign character, this court judging of the contingency in each case for itself.” In that case this court further said: “The fact that the attorney general has declined in this proceeding to represent the relator to appear for the board or state is not decisive against our jurisdiction.” In *State v. McLean County*, 11 N. D. 356, 92 N. W. 385, this court

said: "From the general policy indicated and the language used, it is manifest that this tribunal was intended by the framers of the constitution to be essentially a court of appeals; and therefore we will not assume jurisdiction under the grant contained in section 4, at the relation of private parties, except in cases which present some special reason or some special or peculiar emergency, or where the interests of the state at large are shown to be such that the interests of justice require its exercise." In *State ex rel. Byrne v. Wilcox*, 11 N. D. 335, 91 N. W. 958, this court said: "This raises the question whether such writs can lawfully issue out of this court in any case against the advice of the attorney general. To this question we are constrained to give an affirmative answer. This court reserves the right to exercise judicial discretion in all cases where prerogative writs are asked for, and will issue and refuse to issue writs at its official discretion and according to the exigency of cases. Cases may possibly arise when this court for the protection of grave public interests may deem it to be its duty to override the express wishes of the attorney general with respect to assuming original jurisdiction.

The action of the attorney general in declining to appear on behalf of the state is not of itself sufficient reason for refusing the application of the writ on the request of a private relator, if the facts are such as to materially affect the sovereignty of the state. What are matters of public concern affecting the sovereign rights of the state is not a matter capable of exact definition. Each case must be governed by its own facts. In the case at bar, the question involves the construction of a law to determine whether the governor shall appoint, or the people elect, a judicial officer provided for by the state constitution. It involves the question whether a law of a public nature and necessarily affecting the state at large is properly construed as contemplating immediate action by the governor in making an appointment or a delay in filling the office until an election is held. If no immediate appointment is provided for, then the question is presented whether the defendant should be permitted to act under an illegal appointment under which the validity of his official acts is a matter of serious doubt. Irrespective of the matters of sole and personal interest to the relator, we have no hesitation in saying that a private relator's appeal for our assuming jurisdiction should be granted. The public is interested, and it is a matter of great public

concern that the laws shall be interpreted by courts constituted as provided by the laws, and not otherwise.

As we deem it our duty to assume jurisdiction, it becomes necessary to determine what was the intention of the legislature in respect to the filling of the office in question, and, as preliminary to that question, we must determine whether sections 4 and 5 of the act were constitutionally enacted and are a part thereof. The contention of the respondent is that said sections are foreign to the title of the act. As heretofore shown, the title of the act makes no express reference to the manner of filling of the office of judge of the Ninth district, nor of any of the districts to which the act relates. It is claimed that the constitutional provision requiring the title of every act to express the subject thereof has been violated. Section 61, article 2, of the constitution, which contains this requirement, has often been construed by this court. Prior adjudications as to the application of this constitutional requirement have resulted in establishing several fixed principles of construction of a general nature, among them the following: The title should be liberally, and not technically, construed. The construction should be reasonable. Conflict with the constitutional provision must appear clear and palpable, and, in case of doubt as to whether the subject is expressed in the title, the law will be upheld. Titles should be construed in connection with the law with the view of remedying the evil intended to be obviated by the constitution makers—that of preventing fraud or surprise upon the members of the legislature and the people by introducing provisions into the law independent of or foreign to the subject expressed in the title. If the subjects in the law are germane or reasonably connected with the subject expressed in the title, the constitutional requirement is sufficiently met. The provision is mandatory on the courts and on the legislature. See *Powers Elevator Co. v. Potter* (decided recently) 113 N. W. 703; *State v. Woodmansee*, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420; *State v. Nomland*, 3 N. D. 427, 57 N. W. 85, 44 Am. St. Rep. 572; *Richard v. Stark County*, 8 N. D. 392, 79 N. W. 863; *State v. Home Society*, 10 N. D. 493, 88 N. W. 273. With these principles of construction as established in the prior decisions of this court, we will consider whether the provision of the law that the first incumbent of the office is to be elected by popular will is expressed in the title as contemplated by said section 61, article 2, of the constitution. The title of the

act is as follows: "An act defining the boundaries of the Second, Eighth and Ninth judicial districts of the state of North Dakota, and providing for terms of court in said districts." The general subject of this act plainly is the boundaries of the Second, Eighth and Ninth judicial districts, and connected therewith the matter of terms of court therein. What territory those districts shall contain is not expressed in the title, and need not be, as the words "defining the boundaries" necessarily indicate that the body of the act will determine that question. Nor does the title express when those districts shall become operative as separate judicial districts in the full sense of having a presiding judge for the Ninth judicial district, nor how the judge of that district shall be chosen to the office, nor when such choice shall become effectual. We are convinced beyond any doubt, however, that the specification of these matters in the title is wholly unnecessary, and their absence from the title in no way nullifies any provisions of the law. The title of the act expresses the fact that the boundaries of a new judicial district are defined by the act. Under former laws, there was no Ninth judicial district, and the title of this act plainly specifies that a new district is to be defined. What counties shall comprise this district are subjects for the body of the act. When the law shall become effective is related to the subject, judicial districts, expressed in the title. It is always within the province of the legislature to declare in the body of the law when it shall go into effect, although the title may be silent on that subject. *Wright v. Cunningham*, 115 Tenn. 445, 91 S. W. 293. This is a matter which one may reasonably and naturally expect to find in the body of the act. The title having expressed the facts that the law is to relate to the boundaries of the Ninth district and terms of court therein, a person reading it would naturally know therefrom that the facts relating to the counties comprising the district, the appointment or election of a judge, and when the law is to become operative would be provided for by the act. When the district is to be fully operative by the appointment or election of a judge is a matter incidental to and closely connected with the defining of the boundaries thereof and fixing the terms of court therein. When the title apprises a person that the boundaries of a new district are defined, he would naturally be apprised that the act provides how and when the first incumbent is to be chosen, and when the act becomes operative. Those matters are germane to the

matters of the boundaries of the district and holding terms of court therein. The matter of filling the office of judge of the new district is closely connected with the subject expressed in the title, and is not foreign thereto, and is not an independent subject, and the act is not broader than the title. The appointment or election of a judge refers to the method of filling the office of judge for the new district of which the boundaries are defined, and is therefore the means or instrumentality of carrying into effect the subjects named in the title. It is not essential that the title shall be an index to the act, nor that all the details of the act be therein enumerated. See cases cited above (26 Am. & Eng. Enc. Law, 588; *Aikman v. Edwards*, 55 Kan. 751, 42 Pac. 366, 30 L. R. A. 149), where it held that a title similar to the one under consideration was held sufficiently comprehensive to sustain a provision in the act abolishing a judicial district, and thereby legislating the judge thereof out of office.

In *Commissioners v. Bailey*, 13 Kan. 600, an act was sustained as constitutional which abolished a certain county, although the title only referred generally to "defining the boundaries of counties." In *Re Board of Commissioners*, 4 Wyo. 133, 32 Pac. 850, an act with a title like the one in this case was sustained, and the court said: "The unit, the subject-matter of the legislation comprehended in the act, is the defining of the four judicial districts, and this defining might reasonably include the name, number, and territorial extent and operation of the courts of such judicial district, as they are subordinate, incident and germane to the main and general subject of the act. It would be absurd to say that, in dealing with the reorganization of the judicial districts of the state, the legislature would be compelled to enact one statute creating a new district, another for the appointment or election of a judge, and another for the terms of court in the several counties in each district. All these subjects may well be grouped under the general topic or subject of legislation in one bill with a comprehensive title. The different entireties of such legislation are inharmonious or incongruous. No one would be misled by such a bill while in the course of legislative gestation or by such an act on the statute books. * * * The provisions for the Fourth district and a fourth judge are all matters immediately and intimately connected with and incident to the division of the state into judicial districts." In *Diana Shooting Club v. Lemoreux*,

114 Wis. 44, 89 N. W. 880, 91 Am. St. Rep. 898, a private law having a title, "An Act to incorporate the Mechanic's Union Mfg. Co.," was sustained as not violative of the constitutional provision like our own, although the act provided for the appointment of commissioners to appraise state land and withdrawing such land from market, and the corporation was given the exclusive right to purchase said lands at the appraised value. In that case the court said: "When one reading a bill with the full scope of the title thereof in mind comes upon provisions which he could not reasonably have anticipated because of their being in no way suggested by the title in any reasonable view of it, they are not constitutionally covered thereby. But in applying that rule this other rule, which has been universally adopted, must be kept in mind: The statement of the subject includes, by reasonable inference, all those things which will or may facilitate the accomplishment thereof." See, also, *People ex rel. Brockport v. Sutphin*, 166 N. Y. 163, 59 N. E. 770; *Hope v. Gainesville*, 72 Ga. 246; *Sutherland on Stat. Cons.*, section 129. It is claimed that a provision for the election of a judge in a new district is an innovation upon prior legislation on that subject in this state, as the governor has hitherto been authorized to appoint the first incumbent to the office where new districts have been created. From this it is argued that a person would naturally conclude from the title to this act that an appointment by the governor would necessarily follow. No such conclusion would be justified. It is not contended, and could not be properly contended, that the legislature may not constitutionally provide for an election in place of an appointment by the governor. Hence a person reading this title would necessarily have it suggested to him that it was within the discretion of the legislature to declare whether the new judge was to be appointed or elected, and would naturally look to the law for an answer to the suggestion.

The respondent insists that it was the intent of the legislature that the act should go into effect in July, so far as the creation of the district and filling the office by appointment are concerned, notwithstanding that sections 4 and 5 of the act be declared constitutionally enacted. This presents a question of statutory construction, on which depends the right of the respondent to continue in office. The various sections of the act, when read without resort to extrinsic matters as aids to construction, seem to be in irreconcilable conflict. The provisions of section 2, read in con-

nection with the emergency clause, seem to indicate an intent that the act should go into immediate operation. Sections 4 and 5 by themselves show a positive intent that it shall not go into effect immediately. What was the legislative intent is the test by which the difficulty is to be resolved. As aids in determining this intent in cases where the language used is contradictory or ambiguous, the conditions existing at the time of the passage of the law, the object to be gained by its enactment, the evils to be remedied, the record of its passage as shown by the legislative journals, and any other matters contemporaneous with its enactment that will throw light upon that question are to be considered in connection with the conflicting clauses on the face of the act in judging what the legislative intent was. Sutherland on Stat. Cons. says, in section 263 (2d Ed.): "If a statute is valid, it is to have effect according to the purposes and intent of the lawmaker. The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain, and give effect to that intent. * * * The sole authority of the legislature to make laws is the foundation of the principle that courts of justice are bound to give effect to its intention. When that is plain and palpable, they must follow it implicitly. The rules of construction with which the books abound apply only where the words used are of doubtful import. They are only so many lights to assist the court in arriving with more accuracy at the true interpretation of the intention." From the act alone it would be practically an arbitrary conclusion to say what was the intent of the legislature as to whether a district was to be created and a judge appointed immediately, or whether all was to be in abeyance until after the election of 1908. There is no reasonable and satisfactory construction that will harmonize the conflict between the several sections. By referring to the legislative journals, however, the intent of the legislature becomes plain and pronounced. Our statute provides that we may take judicial notice of the journals of each branch of the legislature and of the history of every statute in its progress through the legislature, and of such contemporaneous history as led up to and probably induced the passage of the law. Subdivisions 57-61, section 7319, Rev. Codes 1905.. Without any statute on the subject, courts may look into legislative proceedings to determine what construction should be given to a law. *Edger v. Randolph Co.*, 70 Ind. 331, and cases cited.

Looking to the journals of the senate, we find that the law under consideration was introduced in the senate as Senate Bill No. 58. As introduced in the senate and as it was read the first and second times, section 4 was as follows: "Sec. 4. Appointment of judge. The governor of this state shall appoint a judge of the district court for the Ninth judicial district of this state, who shall hold office until the next general election, and until his successor is duly elected and qualified, and until the judge of the Ninth judicial district be appointed and qualified, the judge of the Second judicial district shall continue to act as the judge of the district court in and for Pierce county, and the judge of the Eighth judicial district shall continue to act as judge of the district court in and for the counties of Bottineau and McHenry." As originally introduced, the emergency clause was a part of the act the same as it now appears in the act. When the bill was under consideration upon its final passage in the senate, the act was amended by entirely striking out section 4 as it was when introduced, and inserting in lieu thereof the section 4 of the act as it now appears. Section 5 of the act as originally introduced was amended so as to read as section 5 now does, and section 5 of the original act was made to read as section 6 now does. As amended in these particulars, the bill passed the senate, and, after having once failed to pass in the house, was reconsidered, passed unchanged, and sent back to the senate. From the proceedings in the senate when section 4 was stricken out and a provision for the election of the first incumbent to the office at the next general election inserted, it becomes apparent that it was the will of the senate that the office should be filled by election, and not by appointment. This was a positive, unequivocal expression of what was the intent of the senate on that question when that question alone was under consideration, and must govern notwithstanding seeming contradictory provisions that remained in the bill, undoubtedly through inadvertence. The force of this amendment of section 4 shuts out all room for doubt as to whether the office was to be filled by election by the people, or by appointment, and forecloses any necessity of attempting to reconcile the inharmonious sections by giving to the words "election" and "chosen" synonymous meaning. The controlling effect of sections adopted as parts of laws by amendment has often been recognized and given full effect in cases where the amendment did not signify a specific intent in so pronounced

a manner as the one under consideration. In *Arnett v. State ex rel. Donahue* (Ind. Sup.) 80 N. E. 153, 8 L. R. A. (N. S.) 1192, the court said: "It is easy to understand how in the hurry of legislation there may be a failure, in connection with the adoption of an amendment, carefully to eliminate provisions which are really intended to be superseded; but it would discredit the intelligence of the lawmaking power to indulge the supposition that in the adoption of an amendment, containing such a definite statement of what was intended as is found in the amendment in question, the general assembly failed to appreciate the force of such words." In *Small v. Small*, 129 Pa. 366, 18 Atl. 497, the court said: "In truth, the real explanation of both phrases, entirely unsuitable as they stand, is the failure to notice the effect of striking out the words 'including each other,' contained in the act as originally introduced. With these words left in, the absurdity as to suits by the husband disappears, and the phrase 'separate property,' though not elegant as to legal style, is clear and definite in its meaning." In *Edger v. Randolph Co.*, *supra*, the court said: "It has never been held by this court that, for the purpose of construction or interpretation and with a view of ascertaining the legislative will and intention in the enactment of the law, the courts may not properly resort to the journals of the two legislative bodies to learn therefrom the history of the law in question from its first introduction as a bill until its final passage and approval. When, as in this case, a statute has been enacted which is susceptible of several widely different constructions, we know of no better means for ascertaining the will and intention of the legislature than that which is afforded in this case by the history of the statute as found in the journals of the two legislative bodies." See, also, section 470, *Sutherland on Stat. Cons.* (2d Ed.)

It is urgently contended that the recitals of the law conclusively show that it was the conclusion of the legislature that the rights of litigants in the territory affected were so seriously obstructed on account of overcrowded calendars consequent upon the inability of two judges to do the work, and that the provisions of sections 4 and 5 as amended should not have controlling effect, but should be nullified in view of the intent of the legislature, expressed in the emergency clause, to relieve the litigants in this territory from this embarrassment and injury. In our view no such deduction can be legally or reasonably made from the passage of

the law. We concede that a law will be liberally construed to cure the evil intended to be cured, if it can be done without violating settled rules of construction. It was solely for the legislature to say when another judge became a necessity. By striking out section 4 the legislature must be deemed to have intended that the law should not go into effect in July, and should not go into effect by appointment of a judge, but by election in November, 1908. It is not for us to say what was the motive of the legislature. We are concerned only with the question whether it acted within its powers. From the language used and the manner of amending section 4, we are forced to presume that it concluded finally that there was no necessity for another judge until he was elected in 1908, although from the general language of the emergency clause it appears that business in these counties was crowded. The effect of the language of the emergency clause must yield to the specific language of section 4 in view of the manner in which it was adopted. It is stated that chapter 159, page 254, Laws 1907, which divided the state into ten judicial districts, created the Ninth judicial district, and that this is a conclusive legislative declaration that the Ninth district must be considered as in existence from the day of the approval of the act. No such conclusion necessarily follows. Whether it was necessary to pass this act we need not determine; but it did not fully provide for the creation of a new district. The boundaries were not defined. Chapter 159, page 254, and chapter 161, page 255, were passed on the same day, and were approved on the same day, and are clearly in *pari materia*. The creation and existence of the Ninth district, therefore, depends on the effect of the passage of chapter 161. As seen, our construction of the latter law is that the Ninth district was not created absolutely in the sense that a judge was to be appointed or elected thereto immediately. The coming into existence of this district as an entirety was to be held in abeyance until after the election of 1908. The territory comprised therein remained a part of the old districts, and the judges thereof could lawfully act therein the same as they had done previously. In our opinion no part of this law come into operation on its approval, but was to become so later under its express terms.

For these reasons, we conclude that the writ applied for should issue; and it is so ordered. All concur.

(113 N. W. 705.)

HARRIS ARONSON v. HANS OPPEGARD, AS SHERIFF OF BARNES COUNTY, NORTH DAKOTA, AND NORTHWEST THRESHER COMPANY (INTERVENER).

Opinion filed Dec. 20, 1907.

Trial — Equitable Issues — Trial by Court.

1. Plaintiff brought an action for damages for the conversion of grain raised on his land by a tenant under a written lease. The lease provided that the title to the grain should be in the landlord until a division thereof, and that he could hold the same until he had been paid for all advances made to the tenant under the contract. Prior to a division of the grain, the tenant mortgaged his undivided one-half thereof to secure an indebtedness due to a third person, and the mortgagee took possession of the grain and sold the same under the chattel mortgage, through an agent. Plaintiff brought this action against the agent for damages, and the mortgagee was permitted to intervene.

Held, that the intervener was not entitled to trial by the court, as no equitable issues were presented by the pleadings.

Conversion — Pursuit of Property — Special Damages.

2. Special damages on conversion of property are allowed, under section 6585, subd. 3, Rev. Codes 1905, only when properly incurred in pursuit of the property.

Same.

3. Evidence examined, and *held*, that the verdict is excessive as to certain sums, warranting the granting of a new trial unless such sums are remitted.

Appeal from District Court, Barnes county; *Burke, J.*

Action by Harris Aronson against Hans Oppegard, sheriff. The Northwest Thresher Company, intervener. Judgment for plaintiff, and intervener and defendant appeal.

Reversed on conditions.

Ball, Watson, Young & Hardy, for appellants.

Until division tenant has no title to grain raised by him under a farm contract. *Hawk v. Konouzki*, 10 N. D. 37, 64 N. W. 563; *Bidgood v. Monarch Elev. Co.*, 9 N. D. 627, 84 N. W. 561; *Savings Bank v. Canfield*, 81 N. W. 630; *Angell v. Egger*, 6 N. D. 391, 71 N. W. 547; *Whithed v. Elev. Co.*, 9 N. D. 224, 83 N. W. 238.

Where an equitable counterclaim is interposed in a law action, the equitable issue must first be tried by the court, before the legal

issues, as if the counterclaim were a separate suit in equity. *Cotton v. Butterfield*, 14 N. D. 465, 105 N. W. 237; *Laffey v. Gordon*, 15 N. D. 282, 107 N. W. 969; *Arnett v. Smith*, 11 N. D. 55, 88 N. W. 1037; 7 Enc. Pl. & Pr. 810; *Kimball v. McIntyre*, 1 Pac. 167; *Shee-ful v. Murty*, 30 Ohio. St. 30; *Massie v. Stradford*, 17 Ohio St. 596; *Buckner v. Mear*, 26 Ohio. St. 514; *Lestrade v. Barth*, 19 Cal. 660; *Weber v. Marshall*, 19 Cal. 447; *Arguello v. Edinger*, 10 Cal. 150.

A laborer is not entitled to a thresher's lien.

"Advances," as used in the contract, means a loan. 1 Am. & Eng. Enc. Law, 757, 759.

Lee Combs, for respondent.

Right of jury trial cannot be defeated by an intervener pleading equitable facts. *Kassing v. Walter*, 65 N. W. 832.

MORGAN, C. J. Action for damages for the alleged unlawful conversion of grain. The plaintiff is the owner of the land on which the grain alleged to have been converted was grown. The land was cultivated during the year 1904 by one Jacobson under certain conditions specified in a written lease duly executed by Aronson and Jacobson. Among other terms of the contract, it was therein agreed that Jacobson was to farm the land during the years 1904, 1905 and 1906, and furnish all necessary tools and implements, and to furnish and provide all necessary hired help and supplies. Aronson was to furnish all the seed, and was to pay one-half of the machine bill for threshing grain, and was to pay an agreed sum per bushel for hauling the grain to market. The contract also contained the following provisions: "And the said party of the second part [Aronson] has the right to take and hold enough of the crop, stock increase, income and products, that would, on the division of the same, belong to said party of the first part, to repay any and all advances made to him by said party of the second part and interest thereon at 10 per cent per annum, and also to pay all indebtedness due said party of the second part by said party of the first part, if any there be." The contract also provided that Jacobson should not remove from said farm any of the produce thereof, of any kind, description or character, without the written consent of Aronson, until a division thereof, and that, "until such division, the title and possession of all the hay, grain, crops and

produce raised, grown or produced on said premises shall be and remain in the party of the second part." It was further stipulated in the contract that "the party of the second part agrees, upon reasonable request thereafter made, to give and deliver on said farm the one-half of all grains and vegetables so raised and secured upon said farm during said seasons," etc. The crop was partially divided between Aronson and Jacobson, and Jacobson was permitted to dispose of other portions thereof by the written consent of Aronson; but, before there was a division of the wheat and flax, Jacobson gave a chattel mortgage on August 31, 1904, on his undivided one-half of all crops raised on the land to the intervener to secure the sum of \$1,060, a debt due from him to said intervener, and he also sold and assigned all his interest in all of said crops to said intervener in April, 1905, and also sold and assigned to said intervener all claims which he had against said Aronson accruing by virtue of dealings under said contract. After said crop had been threshed, but before the division thereof, the defendant, Oppegard, took possession of said crop as the agent of the intervener by virtue of a certified copy of the chattel mortgage heretofore mentioned, and sold the same. It is for the value of the grain so sold that the plaintiff brings this action, claiming to be the absolute owner thereof under the terms of said contract. Damages were claimed in the sum of \$2,435, with interest thereon since November 10, 1904.

The defendant, Oppegard, interposes an answer, and denies generally every allegation of the complaint. The Northwest Thresher Company intervened by leave of court, and in its complaint alleged that Jacobson had an equitable interest in all crops raised on said land before the division thereof, and that it was entitled to said grain by virtue of the chattel mortgage and assignment thereof from Jacobson to it, and that Jacobson was entitled to a division of said crop before intervener's mortgage and assignments were given. The intervener also asked for judgment in its favor for the sum of \$338.50 claimed to be due to Jacobson on account of certain transactions between him and Aronson under the contract, which Jacobson duly assigned to the intervener. The plaintiff answered the intervener's complaint, and set forth in detail all advances made by him to Jacobson under the contract, and denied all the allegations on which the counterclaim was based.

A jury trial was had, and a verdict was rendered in plaintiff's favor for the sum of \$1,411.55. On a motion for a new trial, the

trial court reduced said verdict in the sum of \$240, and ordered a new trial unless plaintiff would consent to remit that sum, and, if consent was given, that the motion for a new trial be denied. The plaintiff filed a written consent that the verdict be reduced in said sum. The intervener has appealed from the order denying a new trial. Appellant contends that the order should be reversed for three reasons: (1) That he was entitled to have the equitable issues raised by the complaint in intervention and the answer thereto disposed of by a trial to the court. (2) Errors in the admission of evidence. (3) That the verdict was excessive. No question is or was raised as to whether the Northwest Thresher Company was properly permitted to intervene. The issues raised by the intervention pleadings have been litigated without objection, and the appeal will be considered and determined on the assumption that it is a proper case for an intervention, as the parties have waived any objections thereto, if subject to objections at all.

Whether the plaintiff was entitled to a trial by a jury as a matter of right after the intervention had been allowed is a disputed question on the record. Plaintiff contends that an intervener cannot, by raising equitable issues, deprive the plaintiff of his right to a trial by a jury. In other words, it is claimed that the nature of the action must remain the same after as before an intervention, although issues of a different nature are thereby raised. The intervener insists that the same rules must apply in determining whether a jury trial is demandable, after an intervention, as in cases where there is no intervention, although the character of the issues may be changed by the intervention. This question need not be considered, as no strictly equitable issues are presented by the intervention pleadings. The facts set forth in the intervener's complaint entitle it to no equitable relief, and nothing of an equitable character is prayed for. The question ultimately to be determined was, what advances did the plaintiff make to Jacobson under the contract? It is conceded that Aronson is entitled to retain possession of the whole crop until he has been reimbursed for advances made by him pursuant to the contract. What those advances were, and whether they were within the contract, presents no equitable question. The intervener has placed itself in the same position as the defendant would have been in, had there been no intervention. Had the defendant refused to give the plaintiff possession of this grain, the plaintiff could have replevined it; but he would be en-

titled to retain its possession only until satisfaction was made as to the advances made by him. Whereas the title is to remain in the plaintiff until division, his rights thereto are not absolute, but are subject to Jacobson's rights thereto whenever he has complied with the contract. *Angell v. Egger*, 6 N. D. 391, 71 N. W. 547; *Hawk v. Konouzki*, 10 N. D. 37, 84 N. W. 563.

The defendant—or, standing in his place, the intervener—was entitled to show the relations existing between the plaintiff and Jacobson under the contract and what the extent of Jacobson's obligations to the plaintiff were as bearing on the question of damages. The plaintiff was only entitled to the actual damages suffered by him by reason of the unlawful taking of the property. He was not entitled to damages to the full extent of the value of the property, but to the extent of his interest therein by reason of having made advances to Jacobson. Whatever the grain was worth over and above such advances the plaintiff had no interest in. This case is analogous to conversion cases, where the property taken is mortgaged and the mortgagee brings an action for its unlawful conversion. In such cases he is entitled to damages only to the extent of his lien, and special damages in certain cases. The defendant in such cases is entitled to show the extent of such lien in mitigation of damages. The fact that in the case at bar the title to the property was in the plaintiff does not make it different in principle. If plaintiff had brought an action in claim and delivery for the return of the possession wrongfully taken by the agent of the intervener, the plaintiff would have been entitled to a return of the property; but the judgment would be in the alternative—that upon payment of the advances the defendant would be entitled to its possession. *Angell v. Egger*, *supra*. The trial court did not err in submitting the issues to the jury, as no equitable issue was involved.

Errors are assigned on rulings in admitting certain evidence. The first of these relates to evidence of expenses incurred by the plaintiff in regard to a lien filed by a farm laborer for his wages. These expenses amounted to the sum of \$86.50. After investigation, the plaintiff paid the lien and secured its release. We do not think that this expense was proper as damages in the conversion suit. The statute permits a plaintiff in an action for damages for the conversion of his property to recover "a fair compensation for the time and money properly expended in pursuit

of the property." Subdivision 3, section 6585, Rev. Codes 1905. Expenses in and about the protection of property from a laborer's lien filed by a person cannot be justly claimed to be an expenditure in pursuit of property wrongfully taken by another person, from whom damages are claimed. The expenses on the lien claim do not seem to be at all connected with expenses in pursuit of the property taken by the intervener. The evidence as to expenses on this lien claim should have been excluded as not within the terms of the statute. It was therefore error to admit this evidence as bearing on the damages suffered by the plaintiff on account of the conversion. The amount of these expenses was \$86.50. The admission of this evidence entitles the defendant to a new trial.

The intervener claims that other sums were included in the verdict which render it excessive. The objections to these sums are that they cannot properly be called advances within the terms of the contract. We think that the lease authorizes the plaintiff to hold the grain for all advances to Jacobson at his request, specifically or generally given or expressly acquiesced in or consented to be considered as advances. The provision of the lease as to advances contemplates that they are to be made as Jacobson and Aronson, the lessee and lessor, should agree. Aronson and third persons could not, by an arrangement between themselves, subject the grain to the terms of the contract without Jacobson's consent, given either to Aronson or such third person. For instance, Aronson would not be authorized to guarantee or purchase Jacobson's debts, not incurred under the terms of the lease nor within its provisions, and hold the grain until such debts are paid. It seems from the evidence that plaintiff was allowed certain sums as advances which were not furnished to Jacobson for use on the farm at all. The plaintiff guaranteed to pay these sums and others, without reference to the purposes for which they were to be used, and without reference to whether Jacobson consented that his share of the grain should be held for their payment. As stated, we do not think that this was permissible under the contract. Jacobson gave his notes to Blank for certain goods sold to him by Blank, and Aronson paid these notes and now asks to have them allowed as advances. As we construe the evidence, these notes represented personal debts of Jacobson, not in any way connected with the contract. The indebtedness mentioned in the contract, for the payment of which Aronson was authorized to hold the grain, refers to any indebtedness

due Aronson on account of advances made under the contract. Included in the plaintiff's claim against Jacobson is the sum of \$234.65, represented by notes and book accounts of said Blank. This sum was not within the terms of the contract. The verdict cannot be sustained, except on the theory that the jury allowed this sum. It was therefore excessive to this extent and in the further sum of \$86.50, expenses claimed by Aronson in coming from St. Paul to protect his property from the lien filed by the farm laborer. The verdict was therefore excessive in the sum total of \$321.15, besides 10 per cent interest thereon for one year, which was included in the verdict.

We have examined appellant's contentions that the verdict is excessive as to other sums, but we find these contentions untenable. The intervener is entitled to a new trial or to have the verdict reduced by this sum. As the evidence shows the precise sum in which the verdict was excessive, we deem this a proper case for entering a conditional order for a new trial.

A new trial is ordered, unless the plaintiff shall, within ten days after the remittitur is filed in the office of the clerk of the district court, consent in writing that the judgment be reduced in the sum of \$353.26, in addition to the reduction of \$240 ordered by the trial court. The intervener will recover costs of this appeal, if plaintiff does not consent to such reduction. Neither party will recover costs, if consent to the reduction of the verdict be filed. All concur. (114 N. W. 377.)

SALZER LUMBER COMPANY, A CORPORATION, v. W. L. CLAFLIN AND
JOHN E. STRONG.

Opinion filed Nov. 8th, 1907.

Mechanic's Lien — Property Subject — Land Bought on Contract.

1. A materialman furnishing lumber to the occupant of land which is used for the erection of a building on such land, which is held by such occupant as vendee under a contract for the purchase of the same under the crop payment plan, is entitled to a lien on such building and the vendee's interest in the land, when he has complied with the statutory requirements as to the filing of a claim for such lien.

Same — Owner of Land.

2. Under such circumstances, the vendee in the contract is deemed the owner of the land within the meaning of section 6248, Rev. Codes 1905.

Vendor and Purchaser — Relation of Parties.

3. Under such circumstances, the vendee of the land is the equitable owner of the land, and the vendor holds the legal title to the land in trust for the purchaser and as security for the payment of the purchase price.

Mechanic's Lien — Right to Lien.

4. The fact that the vendor terminated the contract after an action to foreclose the lien had been commenced under an arrangement with the vendee does not affect the lien, as the right to such lien must be determined as of the date of furnishing the materials.

Same.

5. The mechanic's lien law is remedial, and should be liberally construed to effectuate its purposes.

Evidence — Presumptions — Official Acts — Affidavits — Venue.

6. The prima facie presumption that an affidavit is sworn to in the county named in its caption or venue is overcome by the presumption that an officer's acts are performed at the county where he is legally authorized to act.

Appeal from District Court, Stutsman county; *Burke, J.*

Action by the Salzer Lumber Company against W. L. Claflin and John E. Strong. Judgment for plaintiff and defendants appeal.

Affirmed.

J. A. Coffey, for appellants.

There must be a substantial interest before a lien will attach. *Reynolds v. Fleming*, 45 N. W. 1099; *Atwater v. Manchester Savings Bank*, 48 N. W. 187; *Hook v. Northwest Thresher Co.*, 98 N. W. 463.

Vendee's interest in the land is to the extent that he has paid on the purchase price. *Bart v. Paff*, 37 L. R. A. 852; *Fish v. Fowlie*, 58 Cal. 375; 28 Am. & Eng. Enc. Law, 107; *Bissell v. Heyward*, 96 U. S. 580; *Jennison v. Leonard*, 21 Wall. 302; *Brooke v. Eastman*, 96 N. W. 699; *Irish v. Lundin et al.*, 44 N. W. 80; *Scott v. Reeve*, 10 N. J. L. 12; *Ivey v. Coston*, 134 Ala. 259; *Rawson v. Coffin*, 55 Ga. 348; *Twogood v. Stephens*, 19 Iowa, 405; *Prater v. Pritchard*, 6 La. Ann. 729; *Houston v. Jordan*, 35 Me. 520; *Jackson v. Scott*, 18 Johns, 94; *Forester v. Hanaway*, 82 Pa. St. 218; *Mooring v. McBride*, 62 Tex. 309.

Vendee cannot subject land to a lien to the vendor's prejudice. *Hickox v. Greenwood*, 94 Ill. 266; *Proctor v. Tows*, 115 Ill. 138; *Stevens v. Lincoln*, 114 Mass. 476; *Wagar v. Briscoe*, 38 Mich. 587; *Lauer v. Bandow*, 43 Wis. 556; *Pinkerton v. Le Beau*, 54 N. W. 98.

Venue of an affidavit is prima facie evidence of the place of its verification. 2 Cyc. 22.

Lee Combs, for respondent.

A vendor failing to object to improvements consents to a lien. *Kealy v. Murray*, 15 N. Y. Supp. 403; *Wheaton v. Berg*, 52 N. W. 926.

Cancellation of contract does not affect lienor's interests. *King v. Smith*, 44 N. W. 65; *Atkins v. Little*, 17 Minn. 432; *Goldheim v. Clark*, 13 Atl. 363; *Hooker v. McGlone*, 42 Conn. 45; *Malmgreen v. Phinney*, 52 N. W. 915, 18 L. R. A. 75.

Lien attaches to the interest of lienee at time of filing. *Miller v. Bergenthal*, 7 N. W. 352; *Moritz v. Splitt*, 13 N. W. 555; *Jones on Liens*, section 1592.

Bare possession of land is an interest, subject to a lien. *Talbot v. Chamberlain*, 3 Page, 220; *Phillip on Mechanics' Liens*, section 187; *McCullough v. Caldwell*, 5 Ark. 237; *Dean v. Phecheon*, 3 Chand. 9; *Jackson v. Garney*, 16 John. 192; *Jackson v. Parker*, 9 Cowen, 73; *Jackson v. Graham*, 3 Kaynes, 189.

Party in possession may subject land to a lien. *Pinkerton v. Le Beau*, 54 N. W. 97; *Leisman v. Lovely*, 45 Wis. 420; *Crary-Lombard Co. v. Partridge*, 37 Pac. 572.

Forfeiture of lien debtor's title does not affect lien. *Sawyer-Austin Lumber Co. v. Clark*, 82 Mo. App. 225; *McGeary v. Osborne*, 9 Cal. 119; *Jodd v. Duncan*, 9 Mo. App. 417; *Pickens v. Plattsmouth Land & Investment Co.*, 55 N. W. 947; *Ah Louis v. Harwood*, 74 Pac. 41.

MORGAN, C. J. Action to foreclose a mechanic's lien. The plaintiff furnished lumber and other materials which were actually used in the construction of buildings and other improvements upon land. The defendant Clafin was in the actual possession of said land when the materials were purchased and the improvements made. He was in such possession under a contract for the purchase of the land on the crop payment plan. The defendant Strong

was the owner of the land. The land was conveyed to him by a former owner after such former owner had entered into the contract with the defendant Claflin for its sale under the crop payment plan. The complaint is in the usual form in actions for foreclosure of mechanics' liens. The answer admits the purchase of the materials and their use in improving the premises sold. Strong denies that the materials were purchased upon his order, consent or acquiescence. The answers also allege that the contract of sale of the land had been terminated, and that the defendant Claflin had no interest in the land after the contract had been legally terminated and canceled. The trial court gave plaintiff judgment for the full amount claimed, and ordered a sale of the land to the extent of Claflin's interest therein when the materials were furnished by the plaintiff. From the judgment so entered, the defendants have appealed and request a trial de novo under the provisions of section 7229, Rev. Codes 1905.

The first contention of appellants is that Claflin had no such interest in the land that a mechanic's lien could attach thereto, and, if such lien ever did attach, the termination and cancellation of the contract by the parties thereto completely cut off such lien before the judgment was entered. He was in possession of it when he purchased the materials, and was making improvements thereon. The contract under which he was in possession is not in the record. Hence its terms are not before us. But it is shown that he was to pay for the land by turning over each year one-half of the proceeds of the crops raised each year. Whether he raised any crop before the contract was canceled is not shown. It seems to be conceded that he paid nothing on the contract, and that interest on the purchase price had accumulated so that more was due on the contract when it was canceled than the original purchase price was. Under these facts, defendants claim that no lien could attach for the alleged reason that Claflin had no interest in the land. It is claimed that a vendee under such a contract must make payments on the contract, and that he must have a substantial interest in the land before the lien can attach. The lien law under which these materials were furnished does not differ from the law now in force so far as the questions raised in this case are concerned. Section 6237, Rev. Codes 1905, provides that "any person who shall perform any labor upon or furnish any materials * * * under a contract with the owner of such land * * *

shall have a lien upon such building * * * and upon the land belonging to such owner, on which the same is situated," etc. Section 6243 provides that "the entire land upon which any such building * * * is situated * * * shall be subject to all liens created by this chapter to the extent of all the right, title and interest owned therein by the owner thereof for whose immediate use or benefit such labor was done or things furnished," etc. Section 6248 provides that "every person for whose immediate use or benefit any building, erection or improvement is made * * * shall be included in the words 'owner thereof.'" Whether Claflin, the vendee in this contract, had such an interest in this land as to be deemed the owner thereof as defined in the mechanic's lien law remains to be determined. The lien law, designed to protect materialmen and laborers, should be liberally construed to effectuate that purpose. The definition given by the statute to the word "owner" is a very broad one, and excludes all idea that a lien is only given to the fee owner. In this state relation of the vendee in a contract for the purchase of real property by future payments has been passed upon. The vendee becomes the equitable owner of the land, and the vendor holds the legal title in trust for the purchaser, and as security for the payment of the purchase price. *Nearing v. Coop*, 6 N. D. 345, 70 N. W. 1044; *Wadge v. Kittleson*, 12 N. D. 452, 97 N. W. 856. Payment of the purchase price entitles the purchaser to a deed, and, until such payment, his rights are measured under the rules applying to equitable owners. The statute (section 6243), in express terms, permits the lienholder to enforce his lien to the extent of all the right, title and interest of the owner. This precludes the idea that there must be absolute ownership in fee before the lien attaches. We think it clear that the vendee under a contract of sale of real estate is expressly entitled to incumber his interest in the land through purchase of materials entitling the person providing them to a lien. We deem it immaterial in this case that no payments had been made. The materials were furnished before the time for payment had arrived under the terms of the contract. The vendee was rightfully in possession, and, while in possession, improved the land. It is clear, however, that the vendor is entitled to the fruits of his contract as he made it, and that liens can be enforced only against the purchaser's interest in the land under the contract. The materialman is simply subrogated to the interest that the vendee had in the contract, and no

more. The vendor's rights are not at all to be affected. The vendor is entitled only to the purchase price. He is entitled to the performance of the contract; everything above that represents the vendee's interest. But to deprive laborers and materialmen of the right to resort to the purchaser's interest in the land, under such contracts, would be subversive of the intent of this statute, and contrary to its express terms. The authorities quite unanimously give the construction to similar statutes. *Boisot on Mech. Liens*, section 301; *Henderson v. Connelly*, 123 Ill. 98, 14 N. E. 1, 5 Am. St. Rep. 490; *State ex rel. v. Insurance Co.*, 115 Ind. 257, 17 N. E. 574; *Pinkerton v. Le Beau*, 3 S. D. 440, 54 N. W. 97; *Kerrick v. Ruggles*, 78 Wis. 274, 47 N. W. 437; *Charleston L. & M. Co. v. Brockmeyer et al.*, 18 W. Va. 586; *Stockwell v. Carpenter*, 27 Iowa, 119; *Short v. Stephens*, 92 Mo. App. 152; *Monroe v. West*, 12 Iowa, 119, 79 Am. Dec. 524; *Phillips on Mech. Liens*, section 169. There is nothing in *Gull River Co. v. Briggs*, 9 N. D. 485, 84 N. W. 349, inconsistent with the conclusion reached by us in this case. In that case the court held that a trespasser upon land could acquire no lien upon land or upon buildings erected by him thereon.

Stress is laid upon the asserted fact that the contract of sale was terminated by the vendor before the judgment in this case was entered. The record shows that the contract was canceled pursuant to an agreement between the vendor and vendee—the defendant in this action—after this foreclosure was commenced. It is shown that the vendor paid the vendee some sum for abandoning the contract and the premises. It would be a harsh and inequitable rule to permit the vendor and vendee to defeat a mechanic's lien, regularly and lawfully acquired, in such a manner. The vendor had actual and constructive notice that a mechanic's lien was claimed, and must be held to have acquired the vendee's interest in the land, subject to such lien. *Pinkerton v. Le Beau*, *supra*; *Henderson v. Connelly*, *supra*. The validity of the lien as to the vendee's interest must be determined as of the date of furnishing the materials, if the statutory requirements as to rendering the same available have afterwards been complied with. The contract of sale was not declared forfeited or terminated by an action in which the plaintiff was made a party, but by what seems to be a proceeding by the consent of the defendants among themselves only. There is no showing that the terms of the contract

as to cancellation were not complied with, nor what such terms were. The owner of the fee acquired nothing by this proceeding so far as the plaintiff is concerned.

The statutory affidavit required before a claim for a lien can become effective contained a caption of venue as follows: "State of North Dakota, County of Stutsman: ss." The jurat attached thereto was as follows: "Subscribed and sworn to before me this 12th day of January, 1905. C. M. Porter, Auditor Foster County." It is claimed that the affidavit was not properly authenticated or attested because of the discrepancy between the venue and the jurat. The contention is that the venue of an affidavit is prima facie evidence of the place where it was taken, and, if the auditor of Stutsman county administered the oath in Foster county, it was a nullity. If the county auditor of Stutsman county administered the oath in Foster county, it would be an illegal act. The presumption that an officer acts within his jurisdiction, and that his acts are lawfully performed, will prevail over the prima facie presumption that the venue of the affidavit is the place where the oath is administered. 2 Cyc. p. 30; Teutonia Loan & Bldg. Co. v. Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419; Goodnow v. Oakley, 68 Iowa, 25, 25 N. W. 912; Goodnow v. Litchfield, 67 Iowa, 691, 25 N. W. 882.

It is claimed that the claim for a lien was not verified. At the trial an unverified claim for a lien was offered in evidence, and on objection thereto the same was not received in evidence, but the court made an order permitting the plaintiff to supply a certified copy of the affidavit as filed before the case was decided, and such copy was then ordered received in evidence. We think this was proper under the circumstances, and was without prejudice to the defendants.

It follows that the judgment must be affirmed; and it is so ordered. All concur.

(113 N. W. 1036.)

INDEX

ABATEMENT. SEE FORCIBLE ENTRY AND DETAINER, 144.

1. Where an appeal from a judgment in Justice Court for possession of certain premises and rent is pending in the District Court, it is a bar to a second action for such possession and rent for the same period, when pleaded in abatement. *McClain v. Nurnberg*, 138.
2. When the second action is based on substantially the same state of facts as the first, the second action will be dismissed as vexatious. *McClain v. Nurnberg*.

ABSTRACT ON APPEAL.

1. Errors in giving instructions must be affirmatively shown by the abstract, and the court will not explore the record to substantiate assignments of error. *Kelly v. Pierce*, 234.

ABUSE OF DISCRETION. SEE DISCRETION, 227, 281, 403.

ACCOUNTING. SEE MORTGAGES, 408, REFERENCE 551.

1. In an action by a vendor to have a deed absolute in form adjudged a mortgage and the evidence as to the amount of indebtedness after deducting rents and profits being vague and uncertain, the District Court is directed to take an account of these matters and upon determining such sum, to enter judgment in accordance with the opinion. *Smith v. Jensen*, 408.
2. The trial court denied the relief asked for, but took an account between the plaintiff, Geo. W. Ferris, and defendant, Jensen, and rendered a money judgment against said defendant and in said plaintiff's favor, basing such action upon the theory of a sale to said defendant of such equitable estate. Whether an accounting was proper under the issues is not determined; the evidence showing that no cause of action was proved, even under such theory. *Ferris v. Jensen*, 462.

ACTIONS. SEE STATUTORY PENALTY, 180; NEGOTIABLE INSTRUMENTS, 306; QUO WARRANTO. 581.

1. The complaint charged defendant with negligence in causing a fire to be started, which spread, causing injury to certain premises claimed to be owned by plaintiff. At the trial plaintiff sought to show an assignment by one M. to him of a cause of action against defendant of a similar nature. Held, that such proof was properly rejected, as it in no way tended to support the allegations of the complaint. *Woodward v. N. P. Ry. Co.*, 38.

ACTIONS—Continued.

2. A mandamus proceeding is not an action under sections 6741-6742, and 6743, Rev. Codes 1905, being a special proceeding. Under section 7229, Rev. Codes 1905, only actions are triable de novo in the Supreme Court, and this does not contemplate the trial de novo of special proceedings. *State v. Fabrick*, 94.
3. The cause of action for equitable relief from a forfeited mechanic's lien may be joined with a cause of action to recover the penalty imposed by the statutes for failing to release the lien on demand. *Sheets v. Prosser*, 180.
4. The plaintiff having paid the fee required by such law and demanded by the county auditor, before he was allowed to file his petition as a candidate, under protest, on the facts disclosed and admitted by the pleadings, an action at law to recover such fee is a proper remedy. *Johnson v. Grand Forks County*, 363.

AFFIDAVIT.

1. Affidavit of notice of sale in real estate mortgage foreclosure reciting that notice was published "seven consecutive times, commencing on July 17, 1885, and ending August 28, 1885, both inclusive, in the *Lisbon Star*, a weekly newspaper," is sufficient. *Cook v. Lockerby*, 19.
2. An affidavit upon information and belief is insufficient upon which to base constructive contempt proceedings, and the court acquires no jurisdiction thereunder to issue an attachment for contempt. *State v. Newton*, 151.
3. The prima facie presumption that an affidavit is sworn to in the county named in its caption or venue is overcome by the presumption that an officer's acts are performed at the county where he is legally authorized to act. *Selzer Lbr. Co. v. Chaffin*, 601.

ALIMONY. SEE SUPREME COURT, 17; DIVORCE, 269.

AMENDMENT. SEE PLEADING, 144.

1. Plaintiff at the trial asked leave to amend his complaint by setting up a cause of action according to M. and alleging an assignment thereof to him prior to the commencement of the action. This amendment would entirely change the cause of action, and hence, was properly refused. Such proposed amendment was also inconsistent with the proof already introduced by plaintiff, which showed that such assignment was not made until after the action was commenced, and should, for that reason, have been denied. *Woodward v. N. P. Ry. Co.*, 38.

ANSWER.

1. When essential arguments are omitted from the complaint and supplied by the answer, which defects in the complaint are cured. *Omlie v. O'Toole*, 126.

APPEALABLE ORDERS. SEE APPEAL AND ERROR, 231.

APPEAL AND ERROR. SEE SUPREME COURT, 234; VERDICT, 248; JUSTICE OF THE PEACE, 335, 355; EVIDENCE, 420; CRIMINAL LAW, 426; INSTRUCTIONS, 426.

1. The respondent is not allowed costs for unnecessary reprinting of portions of abstract in the brief. *State v. Richardson*, 1.
2. Upon cross-examination of plaintiff, it was disclosed that one Chamberlain is to receive 25 per cent of any sum plaintiff may recover in this action, and defendant contends that this should defeat plaintiff's recovery. The answer to this contention is the fact that no such defense was pleaded in the answer, and, furthermore, no ruling was made; nor was the trial court asked to make any ruling upon which such assignment of error should be predicted. *Kepler v. Ford*, 50.
3. Decision of the trial court upon the challenge to a juror for actual bias is entitled to great respect by this court, and will be disturbed only upon a clear abuse of discretion. *State v. Werner*, 83.
4. The competency of a child 8 years old as a witness is for the trial judge to determine within a sound judicial discretion, and such determination will be reversed upon appeal only upon manifest abuse of such discretion. *State v. Werner*, 83.
5. A mandamus proceeding is not an action under sections 6741, 6742 and 6743, Rev. Codes 1905, being a special proceeding. Under section 7129, Rev. Codes, 1905, only actions are triable de novo in the Supreme Court, and this does not contemplate the trial de novo of special proceedings. *State v. Fabrick*, 94.
6. A statement of the case on appeal in a mandamus proceeding which does not contain specifications of error does not admit of a review of anything except the judgment roll. *State v. Fabrick*, 94.
7. Questions certified to the Supreme Court by the District Court for review, pursuant to section 10 of said chapter 161, p. 218, Laws 1903, should be based upon a statement of the facts established on the trial, and the evidence should not be returned to this court. *Grand Forks County v. Frederick*, 118.
8. Upon a review of a judgment of the District Court under section 10, chapter 161, p. 218, Laws 1903, questions of law and not questions of fact are reviewable. *Grand Forks County v. Frederick*, 118.
9. Action of trial court in amending complaint after all evidence is introduced, to make it conform to the proof, when such amendment makes no substantial change in the claim, will not be reviewed on appeal, unless an abuse of discretion is apparent. Held, under the circumstances surrounding making of such amendment in this case, no abuse of discretion appears. *Omlie v. O'Toole*, 126.
10. Irregularities in the certificate of the trial judge of the judgment roll are of no avail to the respondent in this court, when not raised by motion before the appeal is submitted on its merits. *McClain v. Nurnberg*, 138.
11. Indefiniteness in a stipulation under which evidence is received on the trial in the District Court cannot be taken advantage of on appeal, unless based on some objection or motion made in the trial court. *McClain v. Nurnberg*, 138.

APPEAL AND ERROR—Continued.

12. Where the trial court grants leave to amend a complaint and to file the former amended complaint at a later time, and the trial proceeds on the theory that the complaint has been regularly amended and no objection is made to the irregularity until the case reaches the Supreme Court on appeal, the irregularity is waived. *McClain v. Nurnberg*, 144.
13. The fact that a verdict is given for a sum larger than demanded in the original complaint cannot be first raised on appeal. *McClain v. Nurnberg*, 144.
14. The insufficiency of the evidence to sustain the verdict cannot be raised for the first time on appeal, and not then until the particulars are pointed out on new trial proceedings. *McClain v. Nurnberg*, 144.
15. Objections to the competency of evidence cannot be raised for the first time on appeal. *McClain v. Nurnberg*, 144.
16. An order refusing to set aside a judgment rendered after a trial and verdict is not appealable, when such order is based on a motion to set aside the judgment on the ground that the special verdict on which the judgment was entered did not warrant the entry of judgment thereon. *Olson v. Mattison*, 231.
17. Irregularities in the rendition of judgment may be corrected by motion; but the corrections of errors of law occurring at the trial, or in framing or receiving special verdicts, or in entering judgment thereon, can only be made by appeal or motion for a new trial. *Olson v. Mattison*, 231.
18. Errors assigned to the brief, but not argued, will be deemed abandoned. *Kelly v. Pierce*, 234.
19. Where both parties move for a directed verdict, the action of the trial court will be sustained unless there is an absence of any facts in the evidence on which to base it. *Larson v. Calder*, 248.
20. The Supreme Court has the power, under section 7229, Rev. Codes 1905, to determine all the issues between the parties involved in an action appealed under said section. *Mosher v. Mosher*, 269.
21. Error cannot be predicted upon the ruling of the trial court in denying defendant's motion for a directed verdict made at the close of plaintiff's case in chief, where defendant subsequently introduces evidence, and does not renew his motion at the close of all the evidence. Such ruling, if error was thereby waived by the defendant. *Madson v. Rutten*, 281.
22. The Supreme Court is not bound by stipulation of the parties of record to an action wherein it is agreed that the trial court committed error in appellant's brief, and requesting this court to reverse the judgment of the lower court and enter judgment in favor of the appellants, and will not, under the circumstances disclosed by the record and stipulation in this case comply with the terms of such a stipulation especially when the record discloses no reversible error on the part of the trial court, and interested third parties, with the knowledge of both plaintiff and defendant, have participated in and contributed towards the conduct of the litigation from its inception. *Gordon v. Goldamer*, 323.

APPEAL AND ERROR—Continued.

23. An appeal to the District Court from a justice of the peace having been duly taken and perfected by the service of a notice of appeal and undertaking, pursuant to Rev. Codes 1905, sections 8500, 8507, it was error to dismiss the same upon the ground that the justice had failed to transmit to the clerk his transcript as required by the latter section. *Haessly v. Thate*, 403.
24. Under the facts stated in the opinion, it was an abuse of discretion to deny appellant's motion for an order requiring the justice to transmit to the clerk a certified transcript as required by law. *Haessly v. Thate*, 403.
25. The trial court instructed the jury that they might find the defendant guilty whether a gun was shot off by defendant or not, provided they found that he aimed the same at the prosecuting witness with intent so to do. Held, reversible error. *State v. Huns-kor*, 420.
26. The trial court, in addition to sentencing defendant to imprisonment in the county jail, imposed a fine. This was error, as the statute under which defendant was convicted prescribes imprisonment merely, either in the penitentiary or county jail. *State v. Huns-kor*, 420.
27. A defendant in a criminal action is entitled to have submitted to the jury, with proper instructions, all defenses of which there is any support in the evidence, whether such defenses are consistent or inconsistent. It is accordingly held that the trial court properly instructed the jury upon the theory of accidental killing as well as that of justifiable homicide. *State v. Hazlet*, 426.
28. It is error to permit the state to prove other offenses than the one charged, if they in no way tend to prove defendant's guilt of the latter. The rule announced in *State v. Kent*, 5 N. D. 516, 67, N. W. 1052, 35 L. R. 518, is held not applicable to the case at bar. *State v. Hazlet*, 426.
29. The findings of a trial court in an action at law where a jury trial has been waived are presumptively correct and will not be disturbed unless shown to be clearly against the preponderance of the evidence. *Ruettel v. Insurance Co.*, 546.

ASSESSMENT. SEE TAXATION, 118, 193.

ASSIGNMENT.

1. The complaint charged defendant with negligence in causing a fire to be started, which spread, causing injury to certain premises claimed to be owned by plaintiff. At the trial plaintiff sought to show an assignment by one M. to him of a cause of action against defendant of a similar nature. Held, that such proof was properly rejected, as it in no way tended to support the allegations of the complaint. *Woodward v. N. P. Ry. Co.*, 38.

ATTACHMENT.

1. Levy of a writ of attachment upon property covered by chattel mortgage does not waive the lien of such mortgage. *Madson v. Rutten*, 281.

ATTORNEY AND CLIENT.

1. An attorney employed to collect rent and to serve certain notices has no power by virtue of such employment alone to make new contracts for his principal. *McClain v. Nurnberg*, 144.
2. The estate of a decedent is not primarily liable for legal services rendered for the benefit of such estate at the request of the personal representative. Such services are performed for and on behalf of the executor or administrator, who is personally liable for the payment thereof, and for all such reasonable expenditures he is entitled to reimbursement from the estate. *Besancon v. Wegner*, 240.
3. This suit was brought in the name of one Van Gordon as plaintiff, expenses being paid by holders of the liens upon the property in controversy, which liens, if the plaintiff prevailed, would be prior and superior to the liens of the defendants. Van Gordon appeared through an attorney, and was examined as a witness in his own behalf at great length on the trial, and testified that he was the plaintiff, and such testimony was not denied or questioned by either party until the records and briefs had been printed, and the case set for argument in the Supreme Court, when the plaintiff filed an affidavit alleging that he had never employed the attorney of record for plaintiff to bring this action. Held, that even though the attorney claiming to represent the plaintiff and acted without direct authority in bringing suit, plaintiff had ratified his acts and made him his attorney, and that it is too late for plaintiff to deny such employment, or for the defendants to question the attorney's authority for the first time by stipulation and motion to reverse the judgment of the trial court, when set for argument in the Supreme Court. *Gordon v. Goldamer*, 323.

ATTORNEY AT LAW. SEE ATTORNEY AND CLIENT, 323.

ATTORNEY GENERAL.

1. Where a governor of the state appoints a judge of the District Court under a law providing that the office shall be filled by a general election, and a private relator applies for leave to file an application for a writ in the nature of a writ of quo warranto, on the ground that he has suits pending of strictly personal nature, and that the public are interested and that the sovereignty of the state is affected, this court will assume original jurisdiction under section 87, art 4, of the constitution, although the attorney general refuses to consent that said private relator may apply for leave to file the application for such writ in the name of the state. *State v. Burr*, 581.

BAILMENT.

1. The contract set forth in the opinion construed, and held to be an agreement for sale of the property therein mentioned, and not a bailment as contended for by appellant. Held, further, that even if such contract, by reason of ambiguity, could not be held subject to explanation by parol, or by the subsequent conduct of the parties, such proof is insufficient to sustain appellant's contention that the same was intended merely as a storage and transfer contract. *Morrison Mfg. Co. v. Fargo Storage Co.*, 256.

BAILMENT—Continued.

2. A contract of hire between bailor and bailee that the bailee will return a stallion in as good condition as when received or pay for it creates liability on the bailee greater than that imposed by law in the absence of a special contract—that of ordinary care. *Grady v. Schweinler*, 452.
3. Under such a contract, the bailee is liable for the value of a stallion that died of disease while in the bailee's possession, although without fault on his part. *Grady v. Schweinler*, 452.
4. Under such a contract, the bailee becomes an insurer for the return of the stallion. *Grady v. Schweinler*, 452.
5. A complaint states a cause of action in such a case when it pleads the contract and a refusal to perform it after due demand, without any allegations of negligence. *Grady v. Schweinler*, 452.

BILLS AND NOTES. SEE **NEGOTIABLE INSTRUMENTS**, 36, 106, 306; **EVIDENCE**, 126.

BONA FIDE PURCHASER. SEE **NEGOTIABLE INSTRUMENTS**, 36.

BONDS. SEE **MUNICIPAL CORPORATIONS**, 25.

BOUNDARIES.

1. In all cases of disputed boundary lines, evidence of the location of the original monuments which were established by the government surveyors control over plats, field notes, and all other evidence as to the proper location of such lines, when the points where such monuments were thus located can be definitely established. *Prosser v. Wohlwend*, 110.

BRIEF.

1. Errors assigned in the brief, but not argued, will be deemed abandoned. *Kelly v. Pierce*, 234.

BROKERS. SEE **CONTRACTS**, 50.

1. Plaintiff sued to recover a commission earned under a contract with defendant in finding purchasers for plaintiff's land. The contract was offered in evidence by plaintiff, and defendant objected to its reception upon the ground that it was not a contract between the parties, plaintiff not having signed it; and that it was too indefinite and uncertain, and should be first reformed. Held, that the trial court properly overruled this objection. *Kepner v. Ford*, 50.
2. The ruling of the trial court in permitting plaintiff to introduce secondary evidence as to the contents of Exhibit C, being a contract between plaintiff as agent and the purchasers, was error without prejudice. *Kepner v. Ford*, 50.
3. The fact that a portion of the land embraced in the contract consisted of the homestead of the defendant and his wife, and that the latter did not join in the execution of the contract, does not render such contract invalid as it was not a contract for the sale of the property, but a mere agreement on defendants part to compensate plaintiff for finding a purchaser. *Kepner v. Ford*, 50.

BROKERS—Continued.

4. A broker, to recover commission upon negotiating the purchase of land, must prove that he produced a person willing to sell at the agreed price, and was able to convey a merchantable title. *Anderson v. Johnson*, 174.

BURDEN OF PROOF. SEE EVIDENCE, 100, 426.

CANCELLATION OF INSTRUMENTS.

1. Courts of equity will carefully scrutinize contracts between persons occupying relations of trust and confidence, and if it appears that a contract was entered into through the exercise of undue influence practiced by one party upon the other, or if it is grossly unfair or inequitable, the courts will not hesitate to cancel the same. *Fjone v. Fjone*, 100.
2. Where an aged woman executed and delivered to her son a deed to all her real property, and it appears from the relation existing between them that the mother was wholly dependent upon her son and reposed implicit trust and confidence in him in their dealings, the burden is upon the son, in an action to cancel such deed, to show that the same was not obtained through undue influence and that it was in all respects fair and equitable. *Fjone v. Fjone*, 100.

CASES CRITICISED, MODIFIED AND OVERRULED.

1. Where a juror has formed and entertains an opinion as to the guilt or innocence of the accused, which will require evidence to remove, and based wholly upon newspaper accounts and common gossip, he is not disqualified, if he can and will, notwithstanding such opinion, fairly and impartially try the case on the testimony and the laws given by the court. Following *State v. Ekanger*, 8 N. D. 559. *State v. Werner*, 83.
2. The rule of *McAllister v. McAllister*, 7 N. D. 324, 75 N. W. 256, that where one party to a marriage has by her conduct caused the other party to make statements based upon such conduct, which, if not so caused, might be ground for divorce, is adhered to; and held that such statements when so caused do not constitute a ground for divorce. *Mosher v. Mosher*, 269.
3. It is error to permit the state to prove other offenses than the one charged, if they in no way tend to prove defendants guilt of the latter. The rule announced in *State v. Kent*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518, is held not applicable to the case at bar. *State v. Hazlet*, 426.
4. Plaintiffs occupied the land, and farmed the same for several years, but failed to comply with the contract in any material respect, and, having become helplessly in debt and unable to perform his part of the contract, the husband, early in 1903, without his wife joining with him negotiated a sale of his equity therein to defendant Jensen, and sold and disposed of all his personal property, and shortly thereafter yielded possession of the premises to Jensen, both plaintiffs voluntarily removing from the land. Held, following the rule announced in *Helleby v. Dammen*, 13 N. D. 165, 100 N. W. 245, that such facts constituted an abandonment of the contract and of their homestead rights in the land. *Ferris v. Jensen*, 462.

CHAMPERTY AND MAINTENANCE.

1. Upon cross-examination of plaintiff it was disclosed that one Chamberlain was to receive 25 per cent of any sum plaintiff may recover in this action, and defendant contends that this should defeat plaintiff's recovery. The answer to this contention is the fact that no such defense was pleaded in the answer, and furthermore, no ruling was made; nor was the trial court asked to make any ruling upon which such assignment of error could be predicted. *Kepler v. Ford*, 50.
2. A deed is not void or champertous, under section 8733, Rev. Codes 1905, where an attorney for the grantee examines the records before the deed is given and discovers defects in the tax deeds of record on which title is claimed. *State Finance Co. v. Bowdle*, 193.
3. The mere fact that a grantee of a deed of vacant land examined the records of the office of the register of deeds before purchasing the land, and thereby discovers defects in defendant's titles, does not render the deed void for maintenance. *State Finance Co. v. Trimble*, 199.

CHATTEL MORTGAGES. SEE MORTGAGES, 73; DAMAGES, 595.

1. An instrument to form a chattel mortgage, but evidently intended by the parties as security on real property, will be construed to be an equitable mortgage, and will be enforced as such between the parties thereto and those having notice thereof. *Standorf v. Shockley*, 73.
2. A chattel mortgage upon a stock of merchandise which contains a stipulation authorizing the mortgagor to sell the same in the ordinary course of business at retail, without requiring the net proceeds of such sale to be applied upon the mortgage indebtedness, is conclusively deemed to be fraudulent and void as to the creditors of the mortgagor. *Madson v. Rutten*, 281.
3. The fact that the mortgagee under such mortgage takes possession of the mortgaged property pursuant to the terms of the mortgage for the purpose of foreclosure, before a creditor of the mortgagor asserts his rights does not operate to validate such instrument or in any manner affect the rights of such creditor. But where the mortgagee in good faith takes possession of the property and in due form forecloses the mortgage, and sells the property to a third person for full value, such purchaser acquires a good title to the property, and the creditors of the mortgagor cannot pursue the same in his hands. *Madson v. Rutten*, 281.
4. It was the intention of the parties to the mortgage as disclosed by such instrument that additions from time to time for the purpose of replenishing the stock and should be included in and covered by lien on such mortgage, and this intent will be given effect. *Madson v. Rutten*, 281.
5. Levy of a writ of attachment upon property covered by chattel mortgage does not waive the lien of such mortgage. *Madson v. Rutten*, 281.

CHATTEL MORTGAGES—Continued.

6. Appellant who was payee in certain promissory notes which were secured by a chattel mortgage, sold and transferred such notes, together with the mortgage, and at the same time endorsed upon the back of the notes the following: "By agreement with recourse after all security has been exhausted, waiving protest. E. R. Bradley." Held, that such conditional indorsement obligated appellant to pay only such balance as might be due after the security has been exhausted. Held, further, that, until such security is exhausted, no cause of action accrues against such endorser, and therefore that he cannot be joined with the mortgagors as a defendant in an action to foreclose such mortgage. *Smith v. Shaw*, 306.
7. From the voluminous evidence in the case, it is found that defendant Baird waived his rights as holder of a lien on chattels belonging to plaintiff in favor of certain third parties, who took security on the same chattels, in consideration of such third parties making advances and extensions necessary to enable the plaintiff to carry out the terms of the contract with defendant Baird for the cropping of lands belonging to him during the season of 1905. *Gordon v. Goldamer*, 323.
8. The defendant Goldamer purchased lands from the defendant Baird before the crop of 1905 was fully secured, and with it the indebtedness of plaintiff to Baird, secured by the lien above referred to. Held, that the evidence establishes the fact that at the time of such purchase, the defendant Goldamer had both notice and knowledge of such waiver by Baird, and that the security held by Baird was inferior to that held by the third parties. *Gordon v. Goldamer*, 323.

CITIES. SEE MUNICIPAL CORPORATIONS, 25, 313.

CLAIM AND DELIVERY.

1. In an action in claim and delivery in which the issues were as to the right of possession, damages, and the right to and the amount of the lien claimed on the property in suit, the jury returned a verdict as follows: "We, the jury in said action, do hereby find for the defendant in the sum of \$12.00." Held, that the verdict is not responsive to the issues, and not in law a verdict. *Johnson v. Glaspey*, 335.

CLOUD ON TITLE. SEE MECHANIC'S LIEN, 180.

1. A mortgage appearing of record against the property is held, for reasons stated in the opinion, not to be a cloud on the title. *Woodward v. McCollum*, 42.

COMMITTING MAGISTRATE. SEE JUSTICE OF THE PEACE, 204.

CONDEMNATION. SEE EMINENT DOMAIN, 313.

CONDITION PRECEDENT. SEE TENDER, 180.

CONFIDENTIAL RELATIONS. SEE WITNESS, 83; CONTRACT, 100.

CONSTITUTIONAL LAW. SEE TAXATION, 193; HOMESTEAD, 242; EMINENT DOMAIN, 313.

1. A law empowering a city council to determine by a vote whether the city shall avail itself of the provisions of the law is not unconstitutional as a delegation to the council of legislative power. *Vallely v. Park Commissioners*, 25.
2. The provisions of chapter 166, p. 232, Laws 1903, which legalizes only irregularities in assessing or levying taxes upon real estate, do not apply to void assessments by reason of failure to describe the land definitely. *Grand Forks County v. Frederick*, 118.
3. The constitutionality of chapter 189, p. 307, of the Laws of 1907, of this state, requiring the registration and publication of internal revenue tax receipts is assailed upon the grounds: (1). That it is obnoxious to the provisions of the United States constitution, (article 6, section 2) which declares that the constitution and the laws of the United States shall be made in pursuance thereof; shall be the express law of the land; that the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. (2). That it infringes section 13 of the state constitution, which guarantees immunity from self-crimination. *State v. Hanson*, 347.
4. The exercise by congress of the power to tax a business or occupation delegated to it by the federal constitution, and the prescribing of regulations to aid the government in collection of such tax, in no manner curtails or interferes with the exercise by the respective states of their undoubted right under their police power to regulate or entirely prohibit the business or occupation thus taxed, because in its judgment such business or occupation is deemed injurious to the public morals, the public health or the public safety. The power of the state to protect its citizens from the evils of intemperance, to enact or enforce any legislation not in conflict with the federal or state constitution, which it deems advisable or necessary for the safeguarding of the public morals and the preservation of the public health, is not only an attribute of sovereignty, but a power inherent in statehood. In all matters relating to the life, liberty and property of the citizen, the state is sovereign, so long as it does not conflict with the federal constitution. *State v. Hanson*, 347.
5. The provisions of chapter 101, p. 129, Laws of 1901, giving a lien to materialmen and laborers upon buildings erected upon land occupied by persons pursuant to the land laws of the United States, is germane to the title to said law, being, "an act regulating the filing and foreclosure of mechanic's liens upon lands held or occupied under a filing under any of the land laws of the United States," and does not contravene the provisions of section 61, article 2, constitution, providing that the subject of an act shall be expressed in its title. *Powers Elevator Co. v. Pottner*, 359.
6. An act giving to materialmen and laborers a lien upon buildings erected upon government lands held under the laws of the United States is not repugnant to the constitution, provided that all laws of a general nature shall have a uniform operation. *Powers Elevator Co. v. Pottner*, 359.
7. It is incompetent for the legislature to require payment of a fee, either by voters or by candidate, as a condition to having a name

CONSTITUTIONAL LAW—Continued.

of a candidate printed on the official primary election ballot provided for under such law, except such as may be a reasonable fee for services of auditor for filing petition. *Johnson v. Grand Forks County*, 363.

8. It is incompetent for the legislature to prescribe qualifications of voters or candidates for office in addition to those fixed in the constitution. *Johnson v. Grand Forks County*, 363.
9. The provisions exacting fees for printing the names of candidates on the official primary election ballot required by section 4, Laws 1905, p. 208, chapter 109, of the law above referred to is unconstitutional, as being a qualification of voters and candidates not included in the constitution requirements, and is an arbitrary, unwarranted, unreasonable and unnecessary regulation of elections, having no tendency to promote honesty, fairness or good order in the conduct of elections. *Johnson v. Grand Forks County*, 363.
10. Petitioner was adjudged guilty of contempt of court for wilfully violating an order excluding him from visiting the grand jury room while the grand jury were in session. He seeks to justify his action upon the grounds: (1). That he was a duly appointed and qualified assistant state's attorney of the county. (2). That he was employed by the board of county commissioners to assist the state's attorney in the discharge of certain duties; and. (3), That he was a duly appointed and qualified deputy enforcement commissioner of the state under the provisions of chapter 187, p. 303, of the Laws of 1907. Held, for reasons stated in the opinion, that neither his appointment as assistant state's attorney nor his employment by the board of county commissioners vested in him any right to visit such grand jury sessions. Held, also, that no such right could be claimed under his appointment as deputy enforcement commissioner for the reason that the law creating such alleged office is unconstitutional and void for the reason set forth at length in the opinion. *Spalding, J., dissenting. Ex Parte Corliss*, 470.
11. The title to chapter 161, p. 255, Laws 1907, being an act "defining the boundaries of the Second, Eighth and Ninth judicial districts of the State of North Dakota, and providing for terms of court in said districts," does not contravene the provisions of section 61, article 2, of the constitution, requiring that the subject of the act shall be expressed in the title, although the act provides that the judge for the Ninth district shall be elected at the general election of 1908, and that until such election the territory comprising said district shall be and remain a part of the judicial district to which it belongs under existing laws. *State v. Burr*, 581.

CONTEMPT.

1. An affidavit upon information and belief is insufficient upon which to base constructive contempt proceedings and the court acquires no jurisdiction thereunder to issue an attachment for contempt. *State v. Newton*, 151.
2. Defendant does not waive such want of jurisdiction by pleading guilty to the charge thus insufficiently alleged. *State v. Newton*, 151.

CONTEMPT—Continued.

3. Petitioner was adjudged guilty of contempt of court for wilfully violating an order excluding him from visiting the grand jury room while the grand jury were in session. He seeks to justify his action upon the grounds: (1). That he was a duly appointed and qualified assistant state's attorney of the county. (2). That he was employed by the board of county commissioners to assist the state's attorney in the discharge of certain duties; and, (3). That he was a duly appointed and qualified deputy enforcement commissioner of the state under the provisions of chapter 187, p. 303, of the Laws of 1907. Held, for reasons stated in the opinion, that neither his appointment as assistant state's attorney nor his employment by the board of county commissioners vested in him any right to visit such grand jury sessions. Held, also, that no such right could be claimed under his appointment as deputy enforcement commissioner for the reason that the law creating such alleged office is unconstitutional and void for the reasons set forth at length in the opinion. *Ex Parte Corliss*, 470.

CONTRACT. SEE SALES, 10, 234; VENDOR AND PURCHASER, 42;
ATTORNEY AND CLIENT, 144; PLEADING, 290; NEGOTIABLE
INSTRUMENTS, 306; LIENS, 323; BAILMENT, 452.

1. Mere words of disaffirmance followed by positive acts acquiescing in the contract will not effect a rescission of the same. *Owens v. Doughty*, 10.
2. A rescission of a contract must generally be of the contract in its entirety, and not that part which is advantageous to the party. *Owens v. Doughty*, 10. Plaintiff's delay in furnishing title to defendant was not under the circumstances detailed in the opinion sufficient to relieve defendant of his contract duty to accept and pay for the property. Time was not made the essence of the contract, and further, such delay was waived by defendant. *Woodward v. McCollum*, 42.
4. Plaintiff sued to recover a commission earned under a contract with defendant in finding purchasers for plaintiff's land. The contract was offered in evidence by plaintiff, and defendant objected to its reception upon the grounds that it is not a contract between the parties, plaintiff not having signed it; and that it is too indefinite and uncertain, and should be first reformed. Held, that the trial court properly overruled this objection. *Kepner v. Ford*, 50.
5. Exhibit C being a contract entered into by plaintiff and the persons whom he had procured to purchase the property, setting forth the terms of the purchase, was properly admitted in evidence. *Kepner v. Ford*, 50.
6. Courts of equity will carefully scrutinize contracts between persons occupying relations of trust and confidence, and if it appears that a contract was entered into through the exercise of undue influence practiced by one party upon the other, or if it is grossly unfair or inequitable, the courts will not hesitate to cancel the same. *Fjone v. Fjone*, 100.

CONTRACT—Continued.

7. Where an aged woman executed and delivered to her son a deed to all her real property, and it appears from the relations existing between them that the mother was wholly dependent upon her son and imposed implicit trust and confidence in him in their dealings, the burden is upon the son, in an action to cancel such deed, to show that the same was not obtained through undue influence and that it was in all respects fair and equitable. *Fjone v. Fjone*, 100.
8. The contract set forth in the opinion construed, and held to be an agreement of sale of the property therein mentioned, and not a bailment as contended for by appellant. Held, further, that even if such contract, by reason of ambiguity, could be held subject to explanation by parol, or by the subsequent conduct of the parties, such proof is insufficient to sustain appellant's contention that the same was intended merely as a storage and transfer contract. *Morrison Mfg. Co. v. Fargo Storage Co.*, 256.
9. By the terms of this contract, appellant obligated himself to pay the respondent the purchase price of the property on or before December 1, 1909. The indebtedness falling due on said date, respondent was entitled to recover interest thereon from such time, at the legal rate, even though no demand for payment of such indebtedness was made prior to the commencement of this action. *Morrison Mfg. Co. v. Fargo Storage Co.*, 256.
10. A part performance to take the contract out of the statute of frauds the charge of possession must be actual, open and notorious, to support an action for specific performance of an oral contract to convey land. *Muir v. Chandler*, 551.
11. Where the vendor is in possession of land contracts orally to convey to the vendee, an oral lease does not constitute a part performance sufficient to take the transaction out of the statute of frauds. *Muir v. Chandler*, 551.

CONTRIBUTORY NEGLIGENCE. SEE NEGLIGENCE, 60, 377;
PLEADING, 217.

CORPORATIONS.

1. The mere organization of a corporation with a view of taking over the business and property of a copartnership does not of itself transfer the title to the partnership property to the corporation. *Ruettell v. Insurance Co.*, 546.
2. Evidence considered, and held, to show a transfer of the title to the partnership property to a corporation formed for that purpose. *Ruettell v. Insurance Co.*, 546.

COSTS AND DISBURSEMENTS.

1. The respondent is not allowed costs for unnecessary reprinting of portions of abstract in the brief. *State v. Richardson*, 1.
2. Trial courts are vested with a broad discretion in relieving parties from defaults taken against them and in imposing term costs as a condition to such relief; but under the facts in this case it was an abuse of discretion to impose upon plaintiff the payment of \$100 terms as a condition to relieving it from a default judgment taken against it. *Colean Mfg. Co. v. Feckler*, 227.

COSTS AND DISBURSEMENTS—Continued.

3. The defendants appealed from a judgment of a justice of the peace to the district court, and furnished only an undertaking in conformity with section 8503, Rev. Codes 1905, relating to appeals from justice's court. Held, that the words "all costs" contained in the undertaking in accordance with the requirements of section 8503 are sufficiently comprehensive to cover costs on appeal, and that the District Court acquired jurisdiction without filing the bond mentioned in section 8503. Rev. Codes 1905. *Johnson v. Glaspey*, 335.

COUNTIES. SEE OFFICERS, 1.

COUNTY COMMISSIONERS. SEE OFFICERS, 1

1. County commissioners can charge no more than one day for services performed from midnight to midnight, 24 hours; nor for time coming and going from their regular sessions. Mileage only is allowed for such travel. *State v. Richardson*, 1.
2. The fact that a county commissioner does not know that the charges he makes for his services are illegal, is no excuse for making the illegal charge. *State v. Richardson*, 1.
3. Petitioner was adjudged guilty of contempt of court for wilfully violating an order excluding him from visiting the grand jury room while the grand jury were in session. He seeks to justify his actions upon the grounds: (1). That he was a duly appointed and qualified assistant state's attorney of the county. (2). That he was employed by the board of county commissioners to assist the state's attorney in the discharge of certain duties; and, (3), That he was a duly appointed and qualified deputy enforcement commissioner of the state, under the provisions of chapter 187, p. 303, of the Laws of 1907. Held, for reasons stated in the opinion, that neither his appointment as assistant state's attorney nor his employment by the board of county commissioners vested in him any right to visit such grand jury sessions. Held, also, that no such right could be claimed under his appointment as deputy enforcement commissioner for the reason that the law creating such alleged office is unconstitutional and void for the reasons set forth at length in the opinion. *Ex Parte Corliss*, 470.

COUNTY SUPERINTENDENT.

1. Under a law providing that the term of office of the county superintendent of schools shall be two years, and until his successor is elected and qualified, such official continues in office until his successor is elected and qualifies. *State v. Fabrick*, 94.
2. A county superintendent lawfully holding over and continuing to perform the duties of the office is entitled to compensation provided by law for the incumbent of such office. *State v. Fabrick*, 94.

COURTS. SEE JURISDICTION, 269; EMINENT DOMAIN, 313; TRIAL, 377, 387; SUPREME COURT, 457; STATUTORY CONSTRUCTION, 581.

1. A judgment rendered by a justice of the peace of a sister state cannot be proved in this state by an authenticated copy of the record of such justice's court, as neither the act of congress, (Rev. St. section 905, U. S. Comp. St. 1901, p. 677) nor section 7292, Rev. Codes, relates to the authentication of copies of records of courts of limited jurisdiction in other states. *Strecker v. Railson*, 68.
2. A transcript of this judgment having been filed in the office of the Clerk of the District Court of the county where rendered, it was sought to prove the same by an authenticated copy of the records of the District Court, but this was equally inadmissible. *Strecker v. Railson*, 68.
3. Trial courts are vested with a broad discretion in relieving parties from defaults taken against them and in imposing term costs as a condition to such relief; but under the facts in this case it was an abuse of discretion to impose upon plaintiff the payment of \$100 terms as a condition to relieving it from a default judgment taken against it. *Colean Mfg. Co. v. Feckler*, 227.

COVENANTS. SEE DEEDS, 290.

CREDITORS.

1. The fact that the mortgagee under such mortgage takes possession of the mortgaged property pursuant to the terms of the mortgage for the purpose of foreclosure, before a creditor of the mortgagor asserts his rights, does not operate to validate such instrument or in any manner affect the rights of such creditor. But where the mortgagee in good faith takes possession of the property and in due form forecloses the mortgage, and sells the property to a third party for full value, such purchaser acquires a good title to the property, and the creditors of the mortgagor cannot pursue the same in his hands. *Madson v. Rutten*, 281.

CRIMINAL LAW. SEE INSTRUCTIONS, 426.

1. Accusations for removal from office for malfeasance must be presented by a grand jury. *State v. Richardson*, 1.
2. The fact that a county commissioner does not know that the charges he makes for his services are illegal is no excuse for making the illegal charge. *State v. Richardson*, 1.
3. Where a juror has formed and entertains an opinion as to the guilt or innocence of the accused, which it will require evidence to remove, and based wholly upon newspaper accounts and common street gossip, he is not disqualified, if he can and will, notwithstanding such opinion, fairly and impartially try the case on the testimony and the law as given by the court. *State v. Werner*, 83.
4. Prosecution was permitted, over objection, to prove by a physician a conversation between defendant, the state's attorney and witness to show defendant's admission of being afflicted with a loathsome disease, claimed to be communicated to the girl, the victim of a rape; in such conversation defendant said: "There is Doctor

CRIMINAL LAW—Continued.

Todd who treated me. He can tell you." This testimony is deemed improper by the defense. First, because it violated section 7304, Rev. Codes 1905, exempting a physician from testifying without the consent of the patient as to any information acquired in attending him; and, Second, because such conversation could not be construed as an expressed or implied admission of the fact sought to be proved. Such objection held untenable. *State v. Werner*, 83.

5. A justice of the peace has no authority to appoint counsel to defend prisoner either by statute or inherently, nor to make a valid order that the county pay such counsel. *Harris v. Rolette County*, 204.
6. The preliminary examination of a person accused of crime is not a trial within the meaning of that term in section 10216, Rev. Codes 1905. *Harris v. Rolette County*, 204.
7. Appellant was convicted of the crime of shooting at another with a firearm, with intent to do bodily hurt. At the conclusion of the state's case, and also at the conclusion of all the testimony, defendant moved that the jury be advised by the court to acquit. Held, that these motions were properly denied, there being sufficient evidence of guilt to require a submission thereof to the jury, *State v. Hunskor*, 420.
8. The proof disclosed that the prosecuting witness was in a buggy driving west on defendant's premises and was from 30 to 40 rods from defendant when he fired a rifle. The fact that such shot was fired by defendant was not disputed, but the defense contended that it was discharged upward, and the defendant had no intent to shoot the complaining witness. One D was called and testified in defendant's behalf that he saw the gun fired, and that it was held in an upward angle, and that defendant did not aim the gun at the complaining witness. The following question was propounded to the witness, and an objection thereto sustained: "How high over the buggy would you estimate that the bullet would go if it were directly over the buggy?" Held, for reasons stated in the opinion, that such ruling was not error. *State v. Hunskor*, 420.
9. Defendant was asked the question: "Previous to the time you had seen K (the prosecuting witness) had you been trying to stop the public travel on that road?" Held, not reversible error in sustaining an objection thereto. *State v. Hunskor*, 420.
10. A person is not justified in shooting at another to prevent on ordinary trespass to real property. *State v. Hunskor*, 420.
11. The trial court instructed the jury that they might find the defendant guilty whether a gun was shot off by defendant or not, provided they found that he aimed the gun at the prosecuting witness with intent to do so, held reversible error. *State v. Hunskor*, 420.
12. The trial court, in addition to sentencing defendant to imprisonment in the county jail, imposed a fine. This was error, as the statute under which the defendant was convicted, prescribes imprisonment merely, either in the penitentiary or county jail. *State v. Hunskor*, 420.
13. Upon trial for murder, if the defense is justifiable homicide or self-defense, it is prejudicial error to instruct the jury that the bur-

CRIMINAL LAW—Continued.

- den of proof is upon the defendant to establish such defense by preponderance of evidence, under section 10023, Rev. Codes 1905, where such homicide has been established by the state the burden is upon the defendant to prove circumstances of mitigation, excuse or justification, unless the state's proof tends to show such crime is only manslaughter or that the act was justifiable or excusable; but defendant is only required to create a reasonable doubt. *State v. Hazlet*, 426.
14. Burden never shifts to defendant to establish a defense by a preponderance of evidence. *State v. Hazlet*, 426.
 15. A defendant in a criminal action is entitled to have submitted to the jury with proper instructions, all defenses of which there is any support in the evidence, whether such defenses are consistent or inconsistent. It is accordingly held that the trial court properly instructed the jury upon the theory of accidental killing as well as that of justifiable homicide. *State v. Hazlet*, 426.
 16. The defense of accidental killing was not an affirmative defense in the sense that defendant was bound to furnish proof of circumstances tending to substantiate the same. It is a denial of criminal intent, and the burden was upon the state of proving such intent beyond a reasonable doubt. *State v. Hazlet*, 426.
 17. It is error to permit the state to prove other offenses than the one charged, if they in no way tend to prove defendant's guilt of the latter. The rule announced in *State v. Kent*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518, is held not applicable to the case at bar. *State v. Hazlet*, 426.
 18. The trial court charged the jury that, if they believed from the evidence that the defendant had made statements out of court against himself, they had a right to treat such statements as true or false, just as they believed them true or false when considered in the light of all the other facts and circumstances in the case. Held, not error. *State v. Hazlet*, 426.
 19. Where the evidence shows that a homicide was committed in the heat of passion and with provocation, the jury, in determining whether there was sufficient cooling time for the passion to subside and reason to resume its sway, should be governed, not by the standard of an ideal, reasonable person, but from the standpoint of the defendant in the light of all the facts and circumstances disclosed by the evidence. Whether there was cooling time is a question varying with each particular case and with the temperament of the party, and is accordingly held that the instructions given by the trial court upon this subject constituted prejudicial error. *State v. Hazlet*, 426.

CURATIVE ACTS.

1. The provisions of chapter 166, p. 232, Laws 1903, which legalizes only irregularities in assessing or levying taxes upon real estate, do not apply to void assessments by reason of failure to describe the land definitely. *Grand Forks County v. Frederick*, 118.
2. Chapter 166, p. 232, Laws 1903, does not apply to jurisdictional defects in assessment of real property. *State Finance Co. v. Bowdle*, 193.

DAMAGES. SEE NEGLIGENCE, 60; WARRANTY, 248.

1. A vendee who refuses to perform his agreement to execute notes for the purchase price of personal property sold and delivered to him, may be sued by the vendor for damages for breach of the contract immediately upon his refusing to deliver the notes, and the measure of damages will be the contract price. *Kelly v. Pierce*, 234.
2. Submitting the measure of damages to a jury on a wrong theory is error without prejudice, where the result attained is the same as would necessarily have followed, had the question not have been submitted to the jury at all. *Kelly v. Pierce*, 234.
3. Plaintiff may recover damages on the sale of horses warranted against an infectious disease, cost of medicine, feed and attendance, between the sale and the date when the state veterinarian killed them because of such infection. *Larson v. Calder*, 248.
4. This court cannot assume that the jury found only nominal damages for loss of time, when the court gave an erroneous instruction on damages for loss of time caused by the injury, on the strength of which the jury may have materially increased its finding as to the amount of damage. *Barron v. N. P. Ry. Co.*, 277.
5. When actual pecuniary damages are sought for loss of time, some evidence must be given showing such loss and its value to support an instruction to the jury to consider loss of time in fixing damages. *Barron v. N. P. Ry. Co.*, 277.
6. In an action to condemn property for street purposes the railway companies are not entitled to recover damages for structural changes, such as grading, approaches, planking crossings, etc, made necessary by the opening of such street, the duty of making such changes being required by statute enacted under the police power of the state. Section 14, article 1, of the constitution of this state, which provides that "private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into the court for the owner," does not require the allowance of such items of damage. *Grafton v. Ry. Co.*, 313.
7. Defendant not having consented to, nor ratified, such purchase by plaintiff, the same was ineffectual to transfer the title of the property to plaintiff. Hence no recovery can be had in this action under the rule of damages prescribed in subdivision 1, section 6573, Rev. Codes 1905, and the District Court therefore erred in rendering judgment for plaintiff. *Reeves v. Bruening*, 398.
8. In an action by a landlord for the conversion of grain raised by his tenant under a written lease providing that the title to the grain shall be in the landlord until a division thereof, and that he can hold it until paid for all advances to the tenant under the lease; and before division the tenant mortgages his undivided one-half to a third person and the mortgagee takes the grain and sells it under his mortgage, through an agent; upon the latter's intervention he is not entitled to trial by the court where no equitable issues were presented by the pleadings. *Aronson v. Oppgard*, 595.
9. Special damages on conversion of property are allowed, under section 6585, subd. 3, Rev. Codes 1905, only when properly incurred in pursuit of the property. *Aronson v. Oppgard*, 595.

DEBT LIMIT. SEE MUNICIPAL CORPORATIONS, 25.

DEEDS. SEE CONTRACTS, 100; MORTGAGES, 126.

1. In one of the deeds in plaintiff's chain of title the grantor signed his Christian name merely by initials, but the body of the deed set forth his full Christian name, as well as surname. This was sufficient. *Woodward v. McCollum*, 42.
2. One deed in the chain of title describes the grantees as "Chauncey C., Frank E. and Henry S. Woodworth." This was sufficient to vest a two-thirds interest in Chauncey C. Woodworth and Frank E. Woodworth. *Woodward v. McCollum*, 42.
3. A deed from Henry S. Woodworth was signed "Harry" S. Woodworth, although in the body of the instrument the correct name was given. Held, sufficient; the identity of the person being apparent. *Woodward v. McCollum*, 42.
4. An instrument in form a deed may be proved by oral testimony to be a mortgage between the parties and all others with knowledge of its purpose. *Omlie v. O'Toole*, 126.
5. A deed is not void or champertous under section 8732 Rev. Codes 1905, where an attorney for the grantee examines the record before the deed is given and discovers defects in tax deeds of record on which title is claimed. *State Finance Co. v. Bowdle*, 193.
6. The mere fact that a grantee of a deed of vacant land examined the records of the office of the register of deeds before purchasing the land, and thereby discovers defects in defendant's title, does not render the deed void for maintenance. *State Finance Co. v. Trimble*, 199.
7. A complaint in an action brought by the assignee of a remote grantee to recover damages for breach of covenants in a deed to real property, which the complaint alleges that the covenantor neither had title to nor possession of at the time of the execution and delivery of such deed, and fails to allege any transfer of such cause of action by the covenantor to plaintiff's assignor, does not state facts sufficient to constitute a cause of action. *Bull v. Beiseker*, 290.
8. Where a covenantor has neither title nor possession, the covenants do not run with the land, so as to transfer the cause of action for the breach thereof to remote grantees by operation of assumed conveyances of the property by the execution and delivery of deeds purporting to convey the same. *Bull v. Beiseker*, 290.
9. If a grantor assumes to convey real property with full covenants of warranty when he has neither title nor possession, there is at once a constructive eviction of the grantee, which entitled him to the same remedies which he would have had if he had been evicted from actual possession. *Bull v. Beiseker*, 290.
10. The test of whether a person is competent to make a deed is that he should be qualified to do that particular business rationally—not on the one hand that he should be capable of doing all kinds of business with judgment and discretion, nor, on the other, that he should be wholly deprived of reason, so as to be incapable of doing the most familiar and trifling work. Held, that the evidence in this case shows the grantor in a deed to have been competent to execute the same. *Nelson v. Thompson*, 295.

DEEDS—Continued.

11. A deed absolute in form, will be held to be a mortgage where the proof is clear, convincing and satisfactory, that such was the intention of the parties. *Smith v. Jensen*, 408.
12. Where it is admitted that a deed absolute in form was not intended as an unconditional conveyance, but the controversy is as to whether the same was a mortgage or a conditional sale with the right to re-purchase the property on or before a future date, the same will ordinarily be held to be a mere security transaction, and, therefore, a mortgage, where the true character of such transaction is left in doubt by the evidence. *Smith v. Jensen*, 408.
13. Evidence examined and held to show the deed was intended as a mortgage. *Smith v. Jensen*, 408.
14. In an action by a vendor to have a deed, absolute in form, adjudged a mortgage, and asking for an accounting and right to redeem, the amount of indebtedness and right to redeem being in dispute, it is unnecessary for plaintiff to allege or prove a tender to defendant of any sum prior to the commencement of the action; it being sufficient for plaintiff to allege and prove a willingness to redeem by paying such sum as may be adjudged to be due and owing by him to defendant. *Smith v. Jensen*, 408.
15. Evidence examined and held to establish that the deed was taken with a full knowledge of its mortgage character. *Smith v. Jensen*, 408.
16. In an action by a vendor to have a deed absolute in form adjudged a mortgage and the evidence as to the amount of indebtedness after deducting rents and profits being vague and uncertain, the District Court is directed to take an account of these matters and upon determining such sum, to enter judgment in accordance with the opinion. *Smith v. Jensen*, 408.

DE FACTO OFFICERS. SEE OFFICERS, 569.

DEMAND.

1. By the terms of the contract, appellant obligates himself to pay to respondent the purchase price of the property on or before December 1, 1900. The indebtedness falling due on said date, respondent was entitled to recover interest thereon from such time, at the legal rate, even though no demand for payment of such indebtedness was made prior to the commencement of the action. *Morrison Mfg. Co. v. Fargo Storage Co.*, 256.

DEMURRER. SEE OFFICERS, 1.

DISCRETION.

1. Decision of the trial court upon the challenge to a juror for actual bias is entitled to great respect by this court, and will be disturbed only upon a clear abuse of discretion. *State v. Werner*, 83.
2. The competency of a child eight years old as a witness is for the trial judge to determine within a sound judicial discretion, and such determination will be reversed upon appeal only upon manifest abuse of such discretion. *State v. Werner*, 83.

DISCRETION—Continued.

3. Action of trial court in amending complaint after evidence is all introduced, to make it conform to the proof, when such amendment makes no substantial change in the claim, will not be reviewed on appeal, unless an abuse of discretion is apparent. Held, under the circumstances surrounding making of such amendment in this case, no abuse of discretion appears. *Omlie v. O'Tcole*, 126.
4. The issuance of writs of quo warranto by the Supreme Court is wholly discretionary and will be denied upon grounds of public policy where the issuance would result in no perceivable benefit to the relator or others, but would result in great detriment to a large number of people, and would lead to much strife, confusion and litigation. *State v. Nohle*, 168.
5. Trial courts are vested with a broad discretion in relieving parties from defaults taken against them and in imposing term costs as a condition to such relief; but under the facts in this case it was an abuse of discretion to impose upon plaintiff the payment of \$100 terms as a condition to relieving it from a default judgment taken against it. *Coleman Mfg. Co. v. Feckler*, 227.
6. This court will not reverse the trial court on account of receiving evidence out of its proper order, except in a clear case of abuse of discretion. *Madson v. Rutten*, 281.
7. Under the facts stated in the opinion, it was an abuse of discretion to deny appellant's motion for an order requiring the justice to transmit to the clerk a certified transcript as required by law. *Haessly v. Thate*, 403.
8. Whether the court will exercise its extraordinary jurisdiction in cases coming within the above rule is a matter within its sound judicial discretion, depending on the particular facts in each case; but, in cases not within said rule, no discretion is vested in this court. *State v. Holmes*, 457.

DIVORCE.

1. The habitual use of profane language, and the telling of obscene stories by the wife to the husband and to third parties, in his presence and against his wishes, furnishes a ground for divorce, where it appears that the mental and other characteristics of the husband are such that this course of conduct on the part of the wife causes him humiliation and grievous mental suffering. *Mosher v. Mosher*, 269.
2. A continuous course of fault-finding, threats, and other acts, intended to aggravate and annoy the other party to the marriage, though each act is trifling in itself, may cause such a degree of mental suffering as to constitute a ground for divorce on the charge of extreme cruelty. *Mosher v. Mosher*, 269.
3. The rule of *McAllister v. McAllister*, 7 N. D. 324, 75 N. W. 256, that where one party to a marriage has by her conduct caused the other party to make statements based upon such conduct, which, if not so caused, might be ground for divorce, is adhered to; and held that such statements when so caused do not constitute a ground for divorce. *Mosher v. Mosher*, 269.
4. Condonation is revoked and the original cause for divorce revived by the guilty party resuming the former course of ill-treatment. *Mosher v. Mosher*, 269.

DIVORCE—Continued.

5. The Supreme Court has jurisdiction to consider applications for temporary alimony, counsel fees and suit money, after the District Court has lost jurisdiction; but such applications will not be considered as a matter of course, and should be made in the District Court whenever there is reasonable opportunity to present them intelligently to the court before appeal. *Mosher v. Mosher*, 269.

DRAINS.

1. A board of drain commissioners acquired jurisdiction by the filing of a petition; and the withdrawal of names from the petition does not oust it. *Sim v. Rosholt*, 77.

ELECTIONS. SEE CONSTITUTIONAL LAW, 581; JUDICIAL DISTRICTS, 581.

1. A primary election established by chapter 109, p. 207, Laws 1905, (section 555, Rev. Codes 1905), is an election within the meaning of section 121 of the constitution, which prescribes the qualifications for voters at "any election." *Johnson v. Grand Forks county*, 363.
2. It is incompetent for the legislature to require payment of a fee, either by voters or by candidates, as a condition to having the name of a candidate printed on the official primary election ballot provided for under such law, except such as may be a reasonable fee for services of auditor for filing petition. *Johnson v. Grand Forks County*, 363.
3. It is incompetent for the legislature to prescribe qualifications of voters or candidates for office in addition to those fixed in the constitution. *Johnson v. Grand Forks County*, 363.
4. The provision exacting fees for printing the names of candidates on the official primary election ballot required by section 4 (Laws 1905, p. 208, chapter. 109) of the law above referred to is unconstitutional, as being a qualification of voters and candidates not included in the constitutional requirements, and is an arbitrary, unwarranted, unreasonable and unnecessary regulation of elections, having no tendency to promote honesty, fairness or good order in the conduct of elections. *Johnson v. Grand Forks County*, 363.
5. The plaintiff having paid the fee required by such law and demanded by the county auditor, before he was allowed to file his petition as a candidate, under protest, on the facts disclosed and admitted by the pleadings, an action at law to recover such fee is a proper remedy. *Johnson v. Grand Forks County*, 363.

EMINENT DOMAIN.

1. The only question for the court is whether the particular property sought to be condemned is necessary for public use. *Grafton v. Railway Co.*, 313.
2. Under section 7592, Rev. Codes 1905, the complaint in an action by a city to condemn property for street crossing need not allege the public necessity for the crossing sought to be opened. *Grafton v. Railway Co.*, 313.

ENFORCEMENT COMMISSIONER. SEE CONTEMPT, 470.

EQUITABLE MORTGAGES. SEE VENDOR AND PURCHASER, 601.

1. In an action by a vendor to have a deed absolute in form adjudged a mortgage and the evidence as to the amount of indebtedness after deducting rents and profits being vague and uncertain, the District Court is directed to take an account of these matters and upon determining such sum, to enter judgment in accordance with the opinion. *Smith v. Jensen*, 408.

EQUITY. SEE SPECIFIC PERFORMANCE, 551.

1. Courts of equity will carefully scrutinize contracts between persons occupying relations of trust and confidence, and if it appears that a contract was entered into through the exercise of undue influence practiced by one party upon the other, or if it is grossly unfair or inequitable, the courts will not hesitate to cancel the same. *Fjone v. Fjone*, 100.
2. Where an aged woman executed and delivered to her son a deed to all her real property, and it appears from the relation existing between them that the mother was wholly dependent upon her son and reposed implicit trust and confidence in him in their dealings, the burden is upon the son, in an action to cancel such deed, to show that the same was not obtained through undue influence and it was in all respects fair and equitable. *Fjone v. Fjone*, 100.
3. Equity will remove a cloud upon the title caused by the record of a mechanic's lien which has become forfeited by the lien claimant's failure to institute foreclosure proceedings upon demand, under section 4797, Rev. Codes 1899, (section 6246, Rev. Codes 1905). *Sheets v. Prosser*, 180.
4. A court of equity will not require the payment of taxes as a condition of relief from a deed, where there has been no assessment for want of a sufficient description of the land. *State Finance Co. v. Trimble*, 199.
5. Where there has been a valid assessment and levy, and there exists no other jurisdictional defects, equity will require payment of the tax before relief will be decreed. *State Finance Co. v. Trimble*, 199.
6. In an action by a landlord for the conversion of grain raised by his tenant under a written lease providing that the title to the grain shall be in the landlord until a division thereof, and that he can hold it until paid for all advances to the tenant under the lease; and before division the tenant mortgages his undivided one-half to a third person and the mortgagee takes the grain and sells it under his mortgage, through an agent; upon the latter's intervention he is not entitled to trial by the court where no equitable issues were presented by the pleadings. *Aronson v. Oppengard*, 595.

ERROR WITHOUT PREJUDICE. SEE DAMAGES, 234.

ESTATE OF DECEDENT. SEE EXECUTORS AND ADMINISTRATORS, 240.

EVIDENCE. SEE TRIAL, 144; INSANE PERSONS, 295; WAIVER, 323; JURY, 387; MORTGAGES, 408; INSTRUCTIONS, 426, CORPORATIONS, 546; NEW TRIAL, 595.

1. The complaint charged defendant with negligence in causing a fire to be started, which spread, causing injury to certain premises claimed to be owned by plaintiff. At the trial plaintiff sought to show an assignment by one M. to him of a cause of action against defendant of a similar nature. Held that such proof was properly rejected, as it in no way tended to support the allegations of the complaint. *Woodward v. N. P. Ry. Co.*, 38.
2. Plaintiff was properly nonsuited for failure to prove the allegations of the complaint; it appearing that one M., and not plaintiff, was the owner of the property alleged to have been damaged by the fire in question. *Woodward v. N. P. Ry. Co.* 38.
3. Plaintiff sued to recover a commission earned under a contract with defendant in finding purchasers for plaintiff's land. The contract was offered in evidence by plaintiff, and defendant objected to its reception on the grounds that it was not a contract between the parties, plaintiff not having signed it; and that it is too indefinite and uncertain, and should be first reformed. Held, that the trial court properly overruled this objection. *Kepner v. Ford*, 50.
4. Exhibit C, being a contract entered into by plaintiff and the persons whom he had secured to purchase the property, setting forth the terms of the purchase, was properly admitted in evidence. *Kepner v. Ford*, 50.
5. The ruling of the trial court in permitting plaintiff to introduce secondary evidence as to the contents of Exhibit C, being a contract between plaintiff as agent and the purchasers, was error without prejudice. *Kepner v. Ford*, 50.
6. Evidence examined and held to be sufficient, under the rule heretofore established by this court, to require a submission to the jury of the question of defendant's negligence as alleged in the complaint. *Hall v. N. P. Ry. Co.*, 60.
7. A transcript of a justice's judgment having been filed in the office of the clerk of the District Court where rendered, to prove such judgment an authenticated copy of the records of the District Court is inadmissible. *Strecker v. Railson*, 68.
8. Upon trial for rape where the prosecutrix is a child eight years of age and it is claimed that upon medical examination the condition of the child was such that the crime could not have been consummated, held that there was sufficient evidence to justify a conviction. *State v. Werner*, 83.
9. Three days after the commission of the alleged crime the prosecutrix made certain statements to her mother concerning the facts of the case, and the mother was called as a witness and permitted to detail the particulars of such statement over the objection of defendant's counsel. Held, that such testimony was competent, in view of the prior attempt on cross-examination of the girl to discredit and impeach her testimony theretofore given to the effect that she had made such statements to her mother, and also in view of the further fact that the defense had brought out on cross-examination a portion of such particulars. *State v. Werner*, 83.

EVIDENCE—Continued.

10. Prosecution was permitted, over objection, to prove by a physician a conversation between defendant, the state's attorney and witness, to show defendant's admission of being afflicted with a loathsome disease claimed to be communicated to the girl, the victim of a rape; in such conversation defendant said: "There is Doctor Todd who treated me. He can tell you." This testimony is deemed improper by the defense; First, because it violated section 7304, Rev. Codes 1905, exempting a physician from testifying without the consent of the patient as to any information acquired in attending him, and. Second, because such conversation could not be construed as an expressed or implied admission of the fact sought to be proved. Such objection held untenable. *State v. Werner*, 83.
11. In a prosecution for rape the state, over the objection that the same was not proper rebuttal, proved certain facts relating to the physical condition of the prosecutrix and elicited from him, as a medical expert, an opinion conflicting with those of defendant's witnesses, based on the condition of the child at the date of the trial. Held, not error. *State v. Werner*, 83.
12. Where an aged woman executed and delivered to her son a deed to all her real property, and it appears from the relation existing between them that the mother was wholly dependent upon her son and imposed implicit trust and confidence in him in their dealings, the burden is upon the son, in an action to cancel such deed, to show that the same was not obtained through undue influence and that it was in all respects fair and equitable. *Fione v. Fjone*, 100.
13. In all cases of disputed boundary lines, evidence of the location of the original monuments which were established by the government surveyors control over plats, field notes and all other evidence as to the location of such lines, when the point where such monuments were thus located can be definitely established. *Propper v. Wohlwend*, 110.
14. There is a substantial conflict in the evidence as to whether the original government monument marking the south end of the quarter section lines between the lands of plaintiff and defendant was established at the point contended for by plaintiff or at the point contended for by defendant, and hence it was error to direct a verdict. *Propper v. Wohlwend*, 110.
15. An instrument in form a deed may be proved by oral testimony to be a mortgage between the parties and all others with knowledge of its purpose. *Omlie v. O'Toole*, 126.
16. Certain evidence, examined and held sufficient to identify certain notes as given for same debt secured by lien. *Omlie v. O'Toole*, 126.
17. An action to foreclose a deed given as security for debt, wherein the grantee, witness, and the heirs at law of the grantor, since deceased, are adverse parties, testimony of the grantee that he paid interest on a prior mortgage and taxes on the mortgaged premises to protect the lien of his deed does not come within the statute disqualifying a party to an action from testifying to transactions had with a person since deceased. *Omlie v. O'Toole*, 126.
18. The insufficiency of the evidence to sustain the verdict cannot be raised for the first time on appeal, and not then until the particulars are pointed out on new trial proceedings. *McClain v. Nurnberg*, 144.

EVIDENCE—Continued.

19. Objections to the competency of evidence cannot be raised for the first time on appeal. *McClain v. Nurnberg*, 144.
20. Whether or not such a contract as the one stated in the complaint, was in fact entered into, was, under the evidence, a question for the jury, and it was therefore error to direct a verdict in plaintiff's favor. *Anderson v. Johnson*, 174.
21. A clause in a quit-claim deed to the effect that the grantor makes no representation as to his title is not a disclaimer of title, nor does it show a prior abandonment of the land. *State Finance Co. v. Bowdle*, 193.
22. Declarations of the homesteader as to his intentions are competent evidence to sustain the homestead exemption, but such declarations are not conclusive. *Smith v. Spafford*, 208.
23. Evidence considered, and held to show an abandonment of the homestead. *Smith v. Spafford*, 208.
24. A certificate of sale of land for the taxes of 1895, which is void for irregularity in the description of land is not any evidence of assessment and levy of a tax. *State Finance Co. v. Mulberger*, 214.
25. Where both parties move for a directed verdict, the action of the trial court will be sustained unless there is an absence of any facts in the evidence on which to base it. *Larson v. Calder*, 248.
26. It is not necessary to allege or prove in an action for a breach of warranty against an infectious disease that the vendor had knowledge of the infection at the time of the sale. *Larson v. Calder*, 248.
27. In an action to recover for injuries to the person of the plaintiff by reason of the negligence of the defendant, while the plaintiff was a passenger riding in one of the cabooses, it was error justifying the trial court in granting a new trial to instruct the jury to take into consideration the loss of time occasioned plaintiff by the injuries complained of in fixing the amount of damages, when no loss of time was pleaded and no evidence offered showing the value of his time, the extent of his business, or giving the jury any facts on which to base a finding for loss of time. *Barron v. N. P. Ry. Co.*, 277.
28. When actual pecuniary damages are sought for loss of time, some evidence must be given showing such loss and its value to support an instruction to the jury to consider loss of time in fixing damages. *Barron v. N. P. Ry. Co.*, 277.
29. This court will not reverse the trial court on account of receiving evidence out of its proper order, except in a clear case of abuse of discretion. *Madson v. Rutten*, 281.
30. Opinions of witnesses are in general irrelevant. Certain exceptions to this rule, however, exist. Where, for example, the witness is asked to testify from his observation in talking with a person whether in his opinion that person's mind was clear, and whether he was sane or insane. *Nelson v. Thompson*, 295.
31. The city council of respondent city passed an ordinance declaring it necessary to extend one of its streets across appellant's right of way in such city, and it is held that such ordinance was properly received in evidence; the same being competent for the purpose of proving the official determination by the council of the necessity for the crossing. *Grafton v. Railway Co.*, 313.

EVIDENCE—Continued.

32. Under the provisions of section 9390, Rev. Codes 1905, mere knowledge by the vendor of intoxicating liquors lawfully sold in one state that the vendee intends to resell them in violation of the law of another state, it not sufficient to defeat an action brought in the latter state by the vendor against the vendee to recover the purchase price thereof. In order to defeat such action for the purchase price it must appear that the vendor intended by such sale, in some manner, no matter how slight, to aid the vendee in his unlawful design to violate the laws of this state. *Frankel v. Hiller*, 387.
33. Less proof is requisite to establish a partnership in actions against alleged partners than is necessary in actions between the parties themselves. *Frankel v. Hiller*, 387.
34. A deed absolute in form, will be held to be a mortgage where the proof is clear, convincing and satisfactory that such was the intention of the parties. *Smith v. Jensen*, 408.
35. Evidence examined and held to show the deed was intended as a mortgage. *Smith v. Jensen*, 408.
36. In an action by a vendor to have a deed absolute in form adjudged a mortgage and the evidence as to the amount of indebtedness after deducting rents and profits being vague and uncertain, the District Court is directed to take an account of these matters and upon determining such sum, to enter judgment in accordance with the opinion. *Smith v. Jensen*, 408.
37. Appellant was convicted of the crime of shooting at another with a firearm, with intent to do bodily harm. At the conclusion of the state's case, and also at the conclusion of all the testimony, defendant moved that the jury be advised by the court to acquit. Held, that these motions were properly denied, there being sufficient evidence of guilt to require a submission thereof to the jury. *State v. Hunsford*, 420.
38. The proof disclosed that the prosecuting witness was in a buggy driving west on defendant's premises and was from 30 to 40 rods from defendant when he fired a rifle. The fact that such shot was fired by defendant was not disputed, but the defense contended that it was discharged upward, and defendant had no intent to shoot the complaining witness. One D. was called and testified in defendant's behalf that he saw the gun fired, and that it was held in an upward angle, and that defendant did not aim the gun at the complaining witness. The following question was propounded to the witness, and an objection thereto sustained: "How high over the buggy would you estimate that the bullet would go if it were directed over the buggy?" Held, for reasons stated in the opinion, that such ruling was not error. *State v. Hunsford*, 420.
39. Defendant was asked the question: "Previous to the time you had seen K (the prosecuting witness) had you been trying to stop the public travel on that road?" Held, not reversible error in sustaining an objection thereto. *State v. Hunsford*, 420.
40. Certain rulings of the trial court in the admission and rejection of testimony examined, and held, prejudicial error. *State v. Hazlet*, 426.
41. Upon trial for murder, if the defense is justifiable homicide or self defense, it is prejudicial error to instruct the jury that the burden of proof is upon the defendant to establish such defense by preponderance of evidence, under section 10023, Rev. Codes 1905,

EVIDENCE—Continued.

- where such homicide has been established by the state the burden is upon the defendant to prove circumstances of mitigation, excuse or justification, unless the state's proof tends to show such crime is only manslaughter or that the act was justifiable or excusable; but defendant is only required to create a reasonable doubt. *State v. Hazlet*, 426.
42. Burden never shifts to defendant to establish a defense by a preponderance of evidence. *State v. Hazlet*, 426.
 43. The defense of accidental killing was not an affirmative defense in the sense that defendant was bound to furnish proof of circumstances tending to substantiate the same. It is a denial of criminal intent, and the burden was upon the state of proving such intent beyond a reasonable doubt. *State v. Hazlet*, 426.
 44. It is error to permit the state to prove other offenses than the one charged, if they in no way tend to prove defendant's guilt of the latter. The rule announced in *State v. Kent*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518, is held not applicable to the case at bar. *State v. Hazlet*, 426.
 45. It is not error to deny a motion for a directed verdict or for a judgment notwithstanding the verdict, when the evidence shows a conflict as to whether the cause of action pleaded has been proven. *Higgs v. Soo Ry.* 446.
 46. Photographs, duly verified, are admissible in evidence as aids to the jury in arriving at an understanding of the evidence or of the situation or condition or location of objects or premises, material under the same tests as other evidence. *Higgs v. Soo Ry. Co.*, 446.
 47. The weight to be given to such photographs by the jury is not of conclusive effect as a matter of law, but depends upon the skill, accuracy and manner in which taken, and they are to be considered under the same tests as other evidence. *Higgs v. Soo Ry. Co.*, 446.
 48. The findings of the trial court in an action at law where a jury trial has been waived are presumptively correct, and will not be disturbed unless shown to be clearly against the preponderance of the evidence. *Ruettel v. Insurance Co.*, 546.
 49. Resurvey of lands must be in accordance with the laws of the United States and the instructions issued by the officers thereof in charge of the government land surveys. Rev. Codes 1905, section 2540. *Nystrom v. Lee*, 561.
 50. The official instructions to United States surveyors for locating and relocating quarter section corners on interior sections require them to be established equidistant from section corners. Hence, in absence of other evidence, when one corner and the quarter corner are found, the lost section corner will be presumed to have been located the same distance from the quarter corner as the latter is found to be from the existing corner. *Nystrom v. Lee*, 561.
 51. When the northwest, northeast, and southwest corners of an interior section and the west and north quarter corners are found or established, and a point on a line run one mile due south from the northeast corner of the section is found to be just one mile east of the southwest corner, such point in absence of conflicting evidence, will be presumed to be the original southeast section corner, and the points midway between that point and the established corners the south and east quarter corners. *Nystrom v. Lee*, 561.

EVIDENCE—Continued.

52. The rejection of certain evidence held to be error without prejudice under the circumstances of this case. *Nystrom v. Lee*, 561.
53. The prima facie presumption that an affidavit is sworn to in the county named in its caption or venue is overcome by the presumption that an officer's acts are performed at the county where he is legally authorized to act. *Salzer Lbr. Co. v. Claflin*, 601.

EXECUTION.

1. Under the constitution and laws of this state, the husband as the head of the family, is entitled to claim as exempt from the execution sale the homestead, although the fees thereto is vested in his wife. *Bremseth v. Olson*, 242.

EXECUTORS AND ADMINISTRATORS.

1. The estate of a decedent is not primarily liable for legal services rendered for the benefit of such estate at the request of the personal representative. Such services are performed for and on behalf of the executor or administrator, who is personally liable for the payment thereof, and for all such reasonable expenditures he is entitled to reimbursement from the estate. *Besancon v. Wagner*, 240.

EXEMPTIONS. SEE HOMESTEAD, 208, 242.

1. A removal from the homestead, with the intention to abandon the same as a homestead, defeats the homestead exemption after creditors' rights have intervened. *Smith v. Spafford*, 208.
2. Declarations of the homesteader as to his intentions are competent evidence to sustain the homestead exemption, but such declarations are not conclusive. *Smith v. Spafford*, 208.

FEES. SEE COUNTY SUPERINTENDENT, 94.

FINDINGS OF FACT.

1. Findings of Fact and Conclusions of Law considered, and held not to sustain the judgment rendered thereon. *Farquhar v. Higham*, 106.
2. The findings of the trial court in an action at law where a jury trial has been waived are presumptively correct, and will not be disturbed unless shown to be clearly against the preponderance of the evidence. *Ruettel v. Insurance Co.*, 546.

FORCIBLE ENTRY AND DETAINER.

1. Where a tenant, pending an appeal from a judgment against him in justice court in an action of forcible detainer for the possession of real estate and for the recovery of unpaid rent, surrenders the possession of the property, the trial may legally continue in the district courts to determine the issue on the question of rent. *McLain v. Nurnberg*, 144.
2. A justice of the peace acquires jurisdiction to try and determine an action for forcible detainer under section 8406, Revised Codes 1905, by the giving of a notice to quit although such notice is not filed with the justice when the summons is issued. *McClain v. Nurnberg*, 144.

FORCIBLE ENTRY AND DETAINER—Continued.

3. An action for the possession of real estate under the forcible detainer statute may be maintained when the tenant fails to pay the rent within three days after it falls due. *McClain v. Nurnberg*, 144.
4. An objection to a notice to quit leased premises on the alleged ground that the notice does not allege the ground on which the possession is claimed is waived by going to trial without specifically attacking the notice on that ground. *McClain v. Nurnberg*, 144.
5. A notice to quit is not waived by the failure to commence an action for possession under 60 days from the time of giving such notice. *McLain v. Nurnberg*, 144.

FORECLOSURE. SEE MORTGAGES, 73; MECHANIC'S LIEN, 180, SALES, 341, 601.

1. Affidavit of notice of sale in real estate mortgage foreclosure reciting that notice was published "seven consecutive times, commencing on July 17, 1885, and ending August 28, 1885, both inclusive, in the *Lisbon Star*, a weekly newspaper," is sufficient. *Cook v. Lockerby*, 19.
2. The mortgagees in such mortgage were designated under their firm name of *Cook & Dodge*, and, notwithstanding this fact, a statutory foreclosure thereof is sustained. *Cook v. Lockerby*, 19.
3. In an action to foreclose a deed given as security for debt, wherein the grantee, witness, and the heirs at law of the grantor, since deceased, are adverse parties, testimony of the grantee that the paid interest on a prior mortgage and taxes on the mortgaged premises to protect the lien of his deed does not come within the statute disqualifying a party to an action from testifying to transaction had with a person since deceased. *Omlie v. O'Toole*, 126.
4. If a grantor assumes to convey real property with full covenants of warranty when he has neither title nor possession, there is at once a constructive eviction of the grantee, which entitled him to the same remedies which he would have had if he had been evicted from actual possession. *Bull v. Beiseker*, 290.
5. A mere naked color of title, derived through a void foreclosure, does not draw to it even the constructive possession of the property, and therefore does not operate to vest any estate or interest in the property, and cannot confer any such estate or interest by mere lapse of time. *Bull v. Beiseker*, 290.
6. Plaintiff agreed to sell to defendant, and defendant agreed to purchase from plaintiff, a certain threshing rig, and, upon defendant's refusal to accept and settle for such property, plaintiff proceeded to enforce a vendor's lien for the purchase price pursuant to section 6284, Revised Codes 1905. Plaintiff, without defendant's consent, bid such property in at the foreclosure sale. Held, that the statutory manner of foreclosing such liens being the same as that prescribed for the foreclosure of liens on pledged property, plaintiff had no right in the absence of defendant's consent, to purchase the property at the sale, and such sale was therefore voidable at defendant's election. *Reeves v. Bruening*, 398.
7. The enactment of section 6296, Rev. Codes 1905, which provides generally that liens upon personal property may be foreclosed upon the notice and in the manner provided for the foreclosure of mortgages upon personal property, did not operate to repeal the special provision relating to the foreclosure of pledged property as con-

FORECLOSURE—Continued.

tained in chapter 76 of the Civil Code (Rev. Codes 1905), (sections 6193-6218). *Reeves & Co. v. Bruening*, 398.

8. Defendant not having consented to, nor ratified such purchase by plaintiff, the same was ineffectual to transfer the title of the property to plaintiff. Hence no recovery can be had in this action under the rule of damages prescribed in subdivision 1, section 6573, Rev. Codes 1905, and the District Court therefore erred in rendering judgment for plaintiff. *Reeves & Co. v. Bruening* 398.

FOREIGN JUDGMENT. SEE JUDGMENT, 68.

FORFEITURE. SEE STATUTORY PENALTY, 180.

1. A cause of action for equitable relief from a forfeited mechanic's lien may be joined with a cause of action to recover the penalty imposed by the statute for failing to release the lien on demand. *Sheets v. Prosser*, 180.
2. Equity will remove a cloud upon the title caused by the record of a mechanic's lien which has become forfeited by the lien claimant's failure to institute foreclosure proceedings upon demand, under section 4797, Rev. Codes 1899, (Section 6246, Rev. Codes 1905). *Sheets v. Prosser*, 180.

FRAUDS, STATUTE OF. SEE STATUTE OF FRAUDS, 551.

FRAUDULENT CONVEYANCES.

1. A chattel mortgage upon a stock of merchandise which contains a stipulation authorizing the mortgagor to sell the same in the ordinary course of business at retail, without requiring the net proceeds of such sale to be applied upon the mortgage indebtedness, is conclusively deemed to be fraudulent and void as to the creditors of the mortgagor. *Madson v. Rutten*, 281.

GLANDERS.

1. Conviction, under section 9077, Rev. Codes 1905, is not a necessary prerequisite to the maintenance of an action for damages for breach of warranty of horses against the disease known as "glanders." *Larson v. Calder*, 248.
2. Plaintiff may recover damages on the sale of horses warranted against an infectious disease, cost of medicine, feed, and attendance, between the sale and the date when the state veterinarian killed them because of such infection. *Larson v. Calder*, 248.
3. It is not necessary to allege or prove in an action for a breach of warranty against an infectious disease that the vendor had knowledge of the infection at the time of the sale. *Larson v. Calder*, 248.

GOOD WILL. SEE PARTNERSHIP, 234.

GOVERNOR. SEE JUDICIAL DISTRICTS, 581.

GRAND JURY. SEE CRIMINAL LAW, 1.

1. Petitioner was adjudged guilty of contempt of court for wilfully violating an order excluding him from visiting the grand jury room while the grand jury were in session. He seeks to justify his action upon the grounds: (1.) That he was a duly appointed and qualified assistant state's attorney of the county. (2.) That he was employed by the board of county commissioners to assist the state's attorney in the discharge of certain duties; and (3.) That he was a duly appointed and qualified deputy enforcement commissioner of the state under the provisions of chapter 187, p. 303, of the Laws of 1907.
2. Held, for reasons stated in the opinion, that neither his appointment as assistant state's attorney nor his employment by the board of county commissioners vested in him any right to visit such grand jury sessions.
3. Held, also that no such right could be claimed under his appointment as deputy enforcement commissioner for the reason that the law creating such alleged office is unconstitutional and void for the reasons set forth at length in the opinion. Spalding. I. dissenting. Ex Parte Corliss, 470.

GUARANTOR.

1. An indorsement of a promissory note creates no liability of itself, and the indorser is not liable on the indorsement until presentment to the maker and notice to the indorser of such presentment. Farquhar Co. v. Higham, 106.

HABEAS CORPUS. SEE OFFICERS, 569.

1. On application for writ of habeas corpus by a person convicted and sentenced at a term of court held by a de facto, but not de jure judge, and imprisoned under a judgment rendered therein, held, that the relief cannot be granted and the application must be denied. State v. Ely, 569.

HIGHWAYS. SEE MUNICIPAL CORPORATIONS, 313.

HOMESTEAD. SEE VENDOR AND PURCHASER, 462.

1. The assent of the wife is not necessary to an extension of the time of payment of a debt secured by mortgage on the homestead by the husband; and, without her assent, the husband can prevent the statute from running on the mortgage. Omlie v. O'Toole, 126.
2. A wife who joins husband in the execution of a mortgage on the homestead, given to secure his debt, does not thereby become a surety, and is entitled to notice of an extension of the time for payment of the mortgage debt. Omlie v. O'Toole, 126.
3. Residence upon land is generally necessary before a homestead therein can be claimed as exempt. Smith v. Spafford, 208.
4. A removal from the homestead, with the intention to abandon the same as a homestead, defeats the homestead exemption after creditors' rights have intervened. Smith v. Spafford, 208.
5. Declarations of the homesteader as to his intentions are competent evidence to sustain the homestead exemption, but such declarations are not conclusive. Smith v. Spafford, 208.
6. Evidence considered, and held to show an abandonment of the homestead. Smith v. Spafford, 208.

HOMESTEAD—Continued.

7. Under the constitution and laws of this state, the husband, as the head of the family is entitled to claim as exempt from the execution sale the homestead, although the fee thereto is vested in his wife. *Bremseth v. Olson*, 242.
8. Plaintiffs occupied the land, and farmed the same for several years, but failed to comply with the contract in any material respect, and, having become helplessly in debt and unable to perform his part of the contract, the husband early in 1903 without his wife joining with him, negotiated a sale of his equity therein to defendant Jensen, and sold and disposed of all of his personal property, and shortly thereafter yielded possession of the premises to Jensen, both plaintiffs voluntarily removing from the land. Held, following the rule announced in *Helgeby v. Damen*, 13 N. D. 167; 100 N. W. 245, that such facts constituted an abandonment of the contract and of their homestead rights in the land. *Feris v. Jensen*, 462.
9. A wife's homestead rights in land of which her husband has merely an equitable title under an executory contract for the purchase thereof are no greater than, and are dependent upon, the rights of her husband under the contract. If the husband's equitable estate becomes forfeited or otherwise extinguished, the homestead right is also extinguished. *Ferris v. Jensen*, 462.

HOMICIDE. SEE CRIMINAL LAW, 426.

HUSBAND AND WIFE. SEE HOMESTEAD, 50, 462; DIVORCE, 269.

1. The assent of the wife is not necessary to an extension of the time of payment of a debt secured by mortgage on the homestead by the husband; and, without her assent, the husband can prevent the statute of limitation from running on the mortgage. *Omlie v. O'Toole*, 126.
2. A wife who joins husband in the execution of a mortgage on the homestead, given to secure his debt, does not thereby become a surety, and is not entitled to notice of an extension of the time for payment of the mortgage debt. *Omlie v. O'Toole*, 126.
3. Under the constitution and laws of this state, the husband as the head of the family is entitled to claim as exempt from the execution sale the homestead, although the fee thereto is vested in the wife. *Bremseth v. Olson*, 242.

INDORSER. SEE NEGOTIABLE INSTRUMENTS, 106, 306.

INFANTS.

1. Upon trial for rape where the prosecutrix is a child 8 years of age and it is claimed that upon medical examination the condition of the child was such that the crime could not have been consummated, held, that there was sufficient evidence to justify a conviction. *State v. Werner*, 83.

INITIALS. SEE NAMES, 42.

INSANE PERSONS.

1. Opinions of witnesses are in general irrelevant. Certain exceptions to this rule, however, exist. Where, for example, the witness is asked to testify from his observation in talking with a person whether in his opinion that person's mind was clear, and whether he was sane or insane. *Nelson v. Thompson*, 295.
2. The test of whether a person is competent to make a deed is that he should be qualified to do that particular business rationally—not on the one hand that he should be capable of doing all kinds of business with judgment and discretion, nor, on the other, that he should be wholly deprived of reason, so as to be incapable of doing the most familiar and trifling work. Held, that the evidence in this case shows the grantor in a deed to have been competent to execute the same. *Nelson v. Thompson*, 295.

INSTRUCTIONS.

1. A requested instruction is properly refused, unless it is applicable to the facts as proven or to some theory of the evidence given in the case. *McClain v. Nurnberg*, 144.
2. In a prosecution for selling intoxicating liquors as a beverage, contrary to law, the only question in dispute was as to whether the beverage sold was beer or malt. The undisputed evidence shows that if malt, it was not intoxicating. Held error, for the trial court to instruct the jury upon the theory that they might convict if they found that the liquid sold was either malt or any other compound or mixture, if it contained the alcoholic principle and could reasonably be used as a beverage and as a substitute for the ordinary intoxicating liquors. *State v. Seelig*, 177.
3. Section 7021, Rev. Codes 1905, requiring the court to charge the jury in writing is mandatory. *Carr v. Soo Ry.*, 217.
4. If the defendant desired more explicit instructions than were given by the court, they should have been presented to the court in writing, with request that they be given. *Carr v. Soo Ry.*, 217.
5. Errors in giving instructions must be affirmatively shown by the abstract, and the court will not explore the record to substantiate assignments of error. *Kelly v. Pierce*, 234.
6. Submitting the measure of damages to a jury on a wrong theory is error without prejudice, where the result attained is the same as would necessarily have followed, had the question not been submitted to the jury at all. *Kelly v. Pierce*, 234.
7. In an action to recover for injuries to the person of the plaintiff by reason of the negligence of the defendant, while the plaintiff was a passenger riding in one of its cabooses, it was error justifying the trial court in granting a new trial to instruct the jury to take into consideration the loss of time occasioned plaintiff by the injuries complained of in fixing the amount of damages, when no loss of time was pleaded and no evidence offered showing the value of his time, the extent of his business, or giving the jury any facts on which to base a finding for loss of time. *Barron v. N. P. Ry. Co.*, 277.
8. This court cannot assume that the jury found only nominal damages for loss of time, when the court gave an erroneous instruction on damages for loss of time caused by the injury, on the strength of which the jury may have materially increased its finding as to the amount of damage. *Barron v. N. P. Ry. Co.*, 277.

INSTRUCTIONS—Continued.

9. When actual pecuniary damages are sought for loss of time, some evidence must be given showing such loss and its value to support an instruction to the jury to consider loss of time in fixing damages. *Barron v. N. P. Ry. Co.*, 277.
10. A person is not justified in shooting at another to prevent an ordinary trespass to real property. *State v. Hunsford*, 420.
11. The trial court instructed the jury that they might find the defendant guilty whether a gun was shot off by defendant or not, provided they found that he aimed the same at the prosecuting witness with intent so to do. Held reversible error. *State v. Hunsford*, 420.
12. Upon trial for murder, if the defense is justifiable homicide or self defense, it is prejudicial error to instruct the jury that the burden of proof is upon the defendant to establish such defense by preponderance of evidence, under section 10023, Rev. Codes 1905, where such homicide has been established by the state the burden is upon the defendant to prove circumstances of mitigation, excuse or justification, unless the state's proof tends to show such crime is only manslaughter or that the act was justifiable or excusable; but defendant is only required to create a reasonable doubt. *State v. Hazlet*, 426.
13. A defendant in a criminal action is entitled to have submitted to the jury, with proper instructions, all defenses of which there is any support in the evidence, whether such defenses are consistent or inconsistent. It is accordingly held that the trial court properly instructed the jury upon the theory of accidental killing as well as that of justifiable homicide. *State v. Hazlet*, 426.
14. The trial court charged the jury that, if they believed from the evidence that the defendant had made statements out of court against himself, they had a right to treat such statements as true or false, just as they believed them true or false when considered in the light of all the other facts and circumstances in the case. Held, not error. *State v. Hazlet*, 426.
15. The trial court, charged the jury as follows: "It is not enough that the party killing another believed himself in danger from the person killed, unless the facts were such that the jury, in the light of all the facts and circumstances known to the slayer or believed by him to be true, can say he had reasonable ground for such belief." Held correct. But held, further, that defendant's conduct is not to be judged by what a reasonably cautious person might or might not do or consider necessary to do under like circumstances, but what he himself, in good faith, honestly believed and had reasonable grounds to believe was necessary for him to protect himself from apprehended death or great bodily injury. The reasonableness of defendant's belief must be determined from his standpoint, and not from the standpoint of an ideal, reasonable person. *State v. Hazlet*, 426.
16. Where the evidence shows that a homicide was committed in the heat of passion and with provocation, the jury, in determining whether there was sufficient cooling time for the passion to subside and reason to resume its sway, should be governed, not by the standard of an ideal reasonable person, but from the standpoint of the defendant in the light of all the facts and circumstances disclosed by the evidence. Whether there was cooling time is a question varying with each particular case and with the temperament of the party and it is accordingly held that the instruction given by the trial court upon this subject constituted prejudicial error. *State v. Hazlet*, 426.

INSURANCE. SEE BAILMENT, 452.

INTEREST.

1. By the terms of the contract, appellant obligated itself to pay to respondent the purchase price of the property on or before December 1, 1900. The indebtedness falling due on said date, respondent was entitled to recover interest thereon from such time, at the legal rate, even though no demand for payment of such indebtedness was made prior to the commencement of the action. *Morrison Mfg. Co. v. Fargo Storage Co.*, 256.

INTERNAL REVENUE. SEE CONSTITUTIONAL LAW, 347.

INTERVENTION.

1. In an action by a landlord for the conversion of grain raised by his tenant under a written lease providing that the title to the grain shall be in the landlord until a division thereof, and that he can hold it until paid for all advances to the tenant under the lease; and before division the tenant mortgages his undivided one-half to a third person and the mortgagee takes the grain and sells it under his mortgage, through an agent; upon the latter's intervention he is not entitled to trial by the court where no equitable issues were presented by the pleadings. *Aronson v. Oppgard*, 595.

INTOXICATING LIQUORS. SEE CONSTITUTIONAL LAW, 470.

1. In a prosecution for selling intoxicating liquor as a beverage, contrary to law, the only question in dispute was as to whether the beverage sold was beer or malt. The undisputed evidence shows that if malt, it was not intoxicating. Held error, for the trial court to instruct the jury upon the theory that they might convict if they found that the liquid sold was either malt or any other compound or mixture, if it contained the alcoholic principle and could reasonably be used as a beverage and as a substitute for the ordinary intoxicating liquors. *State v. Seelig*, 177.
2. The power of the state to protect its citizens from the evils of intemperance, to enact or enforce any legislation not in conflict with the federal or state constitution, which it deems advisable or necessary for the safeguarding of the public morals and the preservation of the public health, is not only an attribute of sovereignty, but a traffic in intoxicating liquors. *State v. Hanson*, 347.
3. The act in question, which requires publicity to be given of the fact of the payment of such government tax, is a legitimate exercise by the state legislature of the police power of the state, as it tends to aid in the enforcement of the law against the unlawful traffic in intoxicating liquors. *State v. Hanson*, 347.
4. The manifest object of the law was to aid in the better enforcement of the state statute against the business of the unlawful selling of intoxicating liquors, and not, as petitioner contends, to add to or supplement the regulations of congress upon the subject taxing such business; and while the necessary effect of the state law may be to indirectly curtail or decrease the revenues to the general government under the act of congress, this is not a valid objection to the law. The legitimate exercise of this power is in no manner curtailed by the fact that the same incidentally deprive the government of some of its revenue. *State v. Hanson*, 347.

INTOXICATING LIQUORS—Continued.

5. In an action by wholesale liquor dealers located in Minnesota to recover the purchase price of intoxicating liquors sold to persons residing in this state, the answer, in addition to a general denial, alleged that such sales were made in North Dakota, and therefore void under the provisions of section 7621, Rev. Codes 1899. Held, that such sales place in Minnesota, the liquors having been delivered f. o. b. cars at St. Paul, pursuant to orders sent to plaintiffs at that place. *Frankel v. Hillier*, 387.
6. Where neither the contract sued upon, upon its face, nor plaintiff's evidence disclosed, that such contract was illegal as violating the prohibition law, it is error to direct a verdict on such ground. *Frankel v. Hillier*, 387.
7. Under the provisions of section 9390, Revised Codes 1905, mere knowledge by the vendor of intoxicating liquors lawfully sold in one state that the vendee intends to resell them in violation of the law of another state, is not sufficient to defeat an action brought in the latter state by the vendor against the vendee to recover the purchase price thereof. In order to defeat such action for the purchase price it must appear that the vendor intended by such sale, in some manner no matter how slight, to aid the vendee in his unlawful design to violate the laws of this state. *Frankel v. Hillier*, 387.
8. The fact that the contract of partnership between the defendants, if any existed, was for an illegal purpose, to-wit: the unlawful traffic in intoxicating liquors, is not sufficient to defeat a recovery by plaintiffs, in the absence of proof that they were connected in some way with such illegal contract. *Frankel v. Hillier*, 387.

JOINDER. SEE ACTIONS, 180.

JUDICIAL DISTRICTS. SEE CONSTITUTIONAL LAW, 581.

1. Where the governor of the state appoints a judge of the district court under a law providing that the office shall be filled by a general election, and a private relator applies for leave to file an application for a writ in the nature of a writ of quo warranto, on the ground that he has suits pending of strictly personal nature, and that the public are interested and that the sovereignty of the state is affected, this court will assume original jurisdiction under section 87, article 4, of the constitution, although the attorney general refuses to consent that said private relator may apply for leave to file the application for such writ in the name of the state. *State v. Burr*, 581.

JUDGES. SEE OFFICERS, 569; CONSTITUTIONAL LAW, 581.

JUDGMENT. SEE APPEAL AND ERROR, 94, 231; ACCOUNTING, 408.

1. The order finding defendants guilty as they stand charged in paragraphs 17, 25 and 26, of the accusation and that the defendants—naming them—be removed from office, is sufficient basis for a judgment of removal from office; and a judgment in practically the same language is sufficient, and it need not particularize specific acts of guilt. *State v. Richardson*, 1.

JUDGMENT—Continued.

2. A judgment notwithstanding a verdict will not be granted in every case where a directed verdict is erroneously denied. It is only when there is no reasonable probability that the defects in proof or pleading necessary to sustain the verdict can be remedied on another trial that such judgment will be ordered. *Kerr v. Anderson*, 36.
3. A complaint in an action upon a judgment of a justice of the peace of a sister state which fails to allege specifically the facts showing that such court had jurisdiction, both of the subject matter and of the person of the defendant, or that such judgment was "duly given or made," as provided in section 6871, Revised Codes 1905, or words of the exact equivalent, fail to state facts sufficient to constitute a cause of action. *Strecker v. Railson*, 68.
4. A judgment rendered by a justice of the peace of a sister state cannot be proved in this state by an authenticated copy of the record of such justice's court, as neither the act of Congress Rev. St. section 905, (U. S. Comp. St. 1901, page 677) nor section 7292, Rev. Codes 1905, relates to the authentication of copies of records of courts of limited jurisdiction in other states. *Strecker v. Railson*, 68.
5. A transcript of this judgment having been filed in the office of the clerk of the district court in the county where rendered, it was sought to prove the same by an authenticated copy of the records of the district court, but this was equally inadmissible. *Strecker v. Railson*, 68.
6. Findings of fact and conclusions of law considered, and held not to sustain the judgment rendered thereon. *Farouhar Co. v. Higham*, 106.
7. The fact that the sheriff sold land for delinquent taxes under the original judgment, and not under a certified copy thereof, is not a jurisdictional defect that renders the sale void. *State Finance Co. v. Trimble*, 199.
8. Trial courts are vested with a broad discretion in relieving parties from defaults taken against them and in imposing term costs as a condition to such relief; but under the facts in this case it was an abuse of discretion to impose upon plaintiff the payment of \$100 terms as a condition to relieving it from a default judgment against it. *Colean Mfg. Co. v. Feckler*, 227.
9. Irregularities in the rendition of judgment may be corrected by motion; but the correction of errors of law occurring at the trial, or in framing or receiving special verdicts, or in entering judgment thereon, can only be made by appeal or motion for a new trial. *Olson v. Mattison*, 231.
10. The trial court, in addition to sentencing defendant to imprisonment in the county jail imposed a fine. This was error, as the statute under which defendant was convicted prescribes imprisonment merely, either in the penitentiary or county jail. *State v. Hunsford*, 420.

JURISDICTION. SEE COURTS, 68; TAXATION, 193, 199; JUSTICE OF THE PEACE, 204.

1. The Supreme Court has no jurisdiction in a divorce case pending in the district court to entertain a motion for counsel fees to prepare an appeal from an order of the district court made therein for an allowance to the wife, and counsel fees in the main case. *Tonn v. Tonn*, 17.

JURISDICTION—Continued.

2. A board of drain commissioners acquires jurisdiction by the filing of a petition; and the withdrawal of names from the petition does not oust it. *Sim v. Rosholt*, 77.
3. Both parties moved for a directed verdict and defendant's motion was granted. Subsequently plaintiffs' motion for judgment notwithstanding the verdict was granted; later this motion was refused and a similar one for plaintiff granted, held that court had jurisdiction to do this and no error was committed. *Sim v. Rosholt*, 77.
4. A justice of the peace acquires jurisdiction to try and determine an action for forcible detainer under section 8406, Revised Codes 1905, by the giving of a notice to quit although such notice is not filed with the justice when the summons is issued. *McClain v. Nurnberg*, 144.
5. An affidavit upon information and belief is insufficient upon which to base constructive contempt proceedings, and the court acquires no jurisdiction thereunder to issue an attachment for contempt. *State v. Harvey*, 151.
6. Defendant does not waive such want of jurisdiction by pleading guilty to the charge thus insufficiently alleged. *State v. Newton*, 151.
7. The fact that the sheriff sold land for delinquent taxes under the original judgment, and not under a certified copy thereof, is not a jurisdictional defect that renders the sale void. *State Finance Co., v. Trimble*, 199.
8. The Supreme Court has jurisdiction to consider applications for temporary alimony, counsel fees and suit money, after the district court has lost jurisdiction; but such applications will not be considered as a matter of course, and should be made in the district court whenever there is reasonable opportunity to present them intelligently to the court before appeal. *Mosher v. Mosher*, 269.
9. The defendants appealed from a judgment of a justice of the peace to the district court, and furnished only an undertaking in conformity with section 8503, Revised Codes 1905, relating to appeals from justice's court. Held, that the words "all costs" contained in the undertaking in accordance with the requirements of section 8503 are sufficiently comprehensive to cover costs on appeal, and that the district court acquired jurisdiction without filing the bonds mentioned in section 8502, Rev. Codes 1905. *Johnson v. Glaspey*, 335.
10. In an appeal to the district court from a judgment rendered in justice court, the filing of an undertaking with the clerk of the district court within 30 days after the rendition of the judgment is a prerequisite to the transfer of jurisdiction to the district court. *Deardoff v. Thorstensen*, 355.
11. The filing of an undertaking in such cases pertains to the jurisdiction of the district court over the cause and subject-matter of the appeal and cannot be waived by consent of the appellee in submitting to the jurisdiction of the district court. *Deardoff v. Thorstensen*, 355.
12. The Supreme Court's jurisdiction under the constitution to issue original writs (except those writs necessary to the proper exercise of its appellate jurisdiction and to aid in its supervisory control over inferior courts) extends only to prerogative writs, viz: in

JURISDICTION—Continued.

- cases public; juris, wherein are directly involved the sovereignty of the state, its franchises or prerogatives, or the liberty of the citizen. *State v. Holmes*, 457.
- 13 Whether the court will exercise its extraordinary jurisdiction in cases coming within the above rule is a matter within its sound judicial discretion, depending on the particular facts in each case; but, in cases not within said rule, no discretion is vested in this court. *State v. Holmes*, 457.
 14. Applying the above well established rules, it is held that the relator who is county treasurer of Grand Forks county, is not entitled to invoke the jurisdiction of this court to issue the writ of mandamus to compel the state auditor to issue and deliver to the state treasurer a warrant pursuant to the provisions of chapter 139, p. 185, Laws 1903, being section 9395, Revised Codes 1905. *State v. Holmes*, 457.

JUSTICE OF THE PEACE. SEE FORCIBLE ENTRY AND DETAINER, 141.

1. A complaint in an action upon a judgment of a justice of the peace of a sister state which fails to allege specifically the facts showing that such court had jurisdiction, both of the subject matter and of the person of the defendant, or that such judgment was "duly given or made," as provided in Section 6871, Revised Codes 1905, or words of the exact equivalent, fail to state facts sufficient to constitute a cause of action. *Strecker v. Railson*, 68.
2. A judgment rendered by a justice of the peace of a sister state cannot be probed in this state by an authenticated copy of the record of such justice's court, as neither the act of Congress (Revised St. section 905, [U. S. Comp. St. 1901, page 677]) nor section 7292, Rev. Codes 1905, relates to the authentication of copies of records of courts of limited jurisdiction in other states. *Strecker v. Railson*, 68.
3. A transcript of this judgment having been filed in the office of the clerk of the district court in the county where rendered, it was sought to prove the same by an authenticated copy of the records of the district court, but this was equally inadmissible. *Strecker v. Railson*, 68.
4. A justice of the peace acquires jurisdiction to try and determine an action for forcible detainer under section 8406, Revised Codes 1905, by the giving of a notice to quit although such notice is not filed with the justice when the summons is issued. *McClain v. Nurnberg*, 144.
5. A justice of the peace has no authority to appoint counsel to defend prisoner either by statute or inherently, nor to make a valid order that the county pay such counsel. *Harris v. Rolette County*, 204.
6. A committing magistrate has in general only such powers as are conferred upon him by statute. *Harris v. Rolette County*, 204.
7. The defendants appealed from a judgment of a justice of the peace to the district court, and furnished only an undertaking in conformity with section 8503, Revised Codes 1905, relating to appeals from justice's court. Held, that the words "all costs" contained in the undertaking in accordance with the requirements of section 8503 are sufficiently comprehensive to cover costs on appeal, and

JUSTICE OF THE PEACE—Continued.

that the district court acquired jurisdiction without filing the bond mentioned in section 8502. Rev. Codes 1905. *Johnson v. Glaspey*, 335.

8. Under the provisions of section 8328, Rev. Codes 1905, which is to the effect that, if the jurors are discharged without rendering a verdict, " * * * the court shall proceed again to trial as in the first instance, until a verdict is rendered," where the jury returned what was in form a verdict, but which failed to find on all the material issues, the justice was warranted in holding that it was not a lawful verdict, and in setting the case for retrial. *Johnson v. Glaspey*, 335.
9. In an appeal to the district court from a judgment rendered in justice court, the filing of an undertaking with the clerk of the district court within 30 days after the rendition of the judgment is a prerequisite to the transfer of jurisdiction to the district court. *Deardoff v. Thorstensen*, 355.
10. The filing of an undertaking in such cases pertains to the jurisdiction of the district court over the cause and subject-matter of the appeal and cannot be waived by consent of the appellee in submitting to the jurisdiction of the district court. *Deardoff v. Thorstensen*, 355.
11. An appeal to the district court from a judgment of a justice of the peace having been fully taken and perfected by the service of a notice of appeal and undertaking, pursuant to Revised Codes 1905, section 8500, 8507, it was error to dismiss the same upon the ground that the justice had failed to transmit to the clerk his transcript as required by the latter section, *Haessly v. Thate*, 403.
12. Under the facts stated in the opinion, it was abuse of discretion to deny appellant's motion for an order requiring the justice to transmit to the clerk a certified transcript as required by law. *Haessly v. Thate*, 403.

JURY. SEE INSTRUCTIONS, 217, 234, 277, 420, 426; TRIAL, 248; CLAIM AND DELIVERY, 335; VERDICT, 335, 420; EVIDENCE, 446.

1. Where there is a substantial conflict in the testimony, it is reversible error to direct a verdict. Such action by the court is a clear invasion of the province the jury, as the jury, and not the court, must determine the credibility of the witnesses. *Zink v. Lahart*, 56.
2. Certain admonitions by the trial judge to the defendant, while on the witness stand, but not in the presence of hearing of the jury, were not prejudicial to the rights of defendant. *Zink v. Lahart*, 56.
3. Evidence examined, and held to be sufficient, under the rule heretofore established by this court, to require a submission to the jury of the question of defendant's negligence as alleged in the complaint. *Hall v. N. P. Ry. Co.*, 60.
4. It was properly a question for the jury to say under all the evidence whether or not plaintiff was guilty of negligence contributing to the injury complained of. *Hall v. N. P. Ry. Co.*, 60.

JURY—Continued.

5. Where a juror has formed and entertains an opinion as to the guilt or innocence of the accused, which it will require evidence to remove, and based wholly upon newspaper accounts and common street gossip, he is not qualified, if he can and will, notwithstanding such opinion, fairly and impartially try the case on the testimony and the laws given by the court. *State v. Werner*, 83.
6. A decision of the trial court upon the challenge to a juror for actual bias is entitled to great respect by this court, and will be disturbed only upon a clear case of abuse of discretion. *State v. Werner*, 83.
7. Contributory negligence as well as negligence of the defendant, are questions for the jury in a case at law, unless the conceded facts from which the inference must be drawn admit of only one conclusion. *Carr v. Soo Ry.*, 217.
8. If the facts relating to contributory negligence or to negligence of the defendant are such that different impartial minds might fairly draw different conclusions from them, they should be submitted to the jury, and are only for the court when such that fair minded men might draw only one conclusion from them. *Carr v. Soo Ry.*, 217.
9. In an action for negligence of a railroad company in killing and injuring cattle on defendant's right of way by train, plaintiffs rested after proving the killing, injury, and value; but on cross-examination of plaintiffs' witnesses, by whom such proof had been made, it had been shown that plaintiff's buildings were one mile from the railway track; that the cattle in question were confined at the buildings during the night, but in the day time were driven south of the buildings and turned onto grass land according to custom; that they had never before the day in question been known to stray upon the defendant's right of way, but on the day of the accident they went upon the defendant's right of way, without the knowledge of the plaintiffs, and some were killed and others injured by one of defendant's trains. Held, that the question of plaintiffs' negligence in turning their cattle out under the circumstances was for the jury. *Carr v. Soo Ry.*, 217.
10. In such a case, where there is a conflict in the evidence as to the time of day when the accident occurred, and as to whether the day was foggy or clear, and as to whether the train regarding which the defendant's witnesses testified was the one which did the damage, and as to other facts, it being conceded by the defendant's witnesses that they did not stop the train which they were running, and which killed cattle on that day, and took no precaution to avoid injury after they discovered the cattle, held, that the question of negligence on the part of the defendant was properly submitted to the jury, and the defendant's motion for a directed verdict was properly overruled. *Carr v. Soo Ry.*, 217.
11. It is not error to refuse instructions not submitted in writing. *Carr v. Soo Ry.*, 217.
12. Where both parties move for a directed verdict they waive their right to submission of questions of fact to the jury. *Larson v. Calder*, 248.
13. The respondents furnished the building and lot upon which such illegal business was conducted under an agreement with his co-defendant that he should receive one-half of the net profits of the business. Held, under the evidence, that it was for the jury to say

JURY—Continued.

what the intention of the parties was; such intention, when ascertained, being largely controlling. *Frankel v. Hillier*, 387.

14. The findings of the trial court in an action at law where a jury trial has been waived are presumptively correct, and will not be disturbed unless shown to be clearly against the preponderance of the evidence. *Ruetel v. Insurance Co.*, 546.

LANDLORD AND TENANT. SEE FORCIBLE ENTRY AND DETAINER, 144; TROVER AND CONVERSION, 595.

LEGISLATURE. SEE STATUTORY CONSTRUCTION, 581.

1. An act of the legislative assembly authorizing a board appointed by the city council without the consent of the people to levy general taxes is unconstitutional as a delegation of legislative power. *Vallely v. Park Com'rs*, 25.
2. In determining what the legislative intent was in passing a law that is ambiguous in its terms, the journals of the legislature may be read in order to correctly ascertain such intention. *State v. Burr*, 581.
3. In determining what the legislative intention was in passing a law whose provisions are contradictory on its face, the fact that the journal shows that a positive provision, contradictory of a provision stricken out, was inserted in the act by an amendment adopted as the last act before it was passed by one body, will be accepted as controlling of the intent, and the seemingly contradictory provisions left in the act will be disregarded and deemed to be in the law through inadvertence. *State v. Burr*, 581.

LIENS. SEE CHATTEL MORTGAGES, 323; MECHANIC'S LIEN, 359.

1. Whether, under the seed lien law of this state, a person furnishing two or more kinds of seed grain to another under one entire contract may perfect a lien which will be effective upon all the crops produced from the seed thus furnished for the entire purchase price thereof, not determined. *Schlosser v. Moores*, 185.
2. Plaintiff, under a verbal contract sold and delivered to S, 200 bushels of seed wheat at 75 cents per bushel and 60 bushels of seed flax at \$2 per bushel, and filed one lien statement for the total purchase price, claiming a lien indiscriminately upon the crops produced from such seed for the entire amount due him under the contract but stating the number of bushels of each kind of grain and the price per bushel. Held, that the contract is not entire, but is divisible, and that plaintiff's lien is therefore divisible, and should be construed as two liens: one upon the wheat for the value of the wheat seed furnished, and the other upon the flax for the value of the flax seed furnished. *Schlosser v. Moores*, 185.
3. Under the seed lien statute of this state (sections 6271, 6272, Rev. Codes 1905), a person who in good faith furnishes seed grain to another is entitled to a lien for the entire purchase price of such seed upon the crop produced therefrom, whether all of such seed is sown or not. *Schlosser v. Moores*, 185.
4. When plaintiff rested his case the trial court directed a verdict in favor of defendant. Held, error, as plaintiff's proof showed that he had a valid and subsisting lien upon the property described in the

LIENS—Continued.

complaint and that defendant had converted the same. *Schlosser v. Moores*, 185.

5. The plaintiff, who had induced third parties to make him advances to enable him to comply with the terms of the farm contract by means of which he raised a crop during 1905, and for which he had given them security, which is held to be prior to that held by the landlord on the crop raised, not only has an interest in the lawful application of the proceeds of such crop to his indebtedness, but it is his duty to secure if possible, such application in the order of priority of the security afforded by liens upon such crop when the total proceeds are insufficient to pay all lienholders in full. *Gordon v. Goldamer*, 323.
6. The mortgagor is a proper party plaintiff in a suit to secure application of the proceeds derived from the security for debts secured by the various liens in the order of their priority; and, conceding that a part of the lienholders might properly have been joined as plaintiff, or might have maintained independent actions to secure their rights, it is too late for defendants to first object in the Supreme Court to their non-joinder as plaintiffs. *Gordon v. Goldamer*, 323.
7. Plaintiff agreed to sell to defendant, and defendant agreed to purchase from plaintiff, a certain threshing right, and, upon defendant's refusal to except and settle for such property, plaintiff proceeded to enforce a vendor's lien for the purchase price pursuant to section 6284, Rev. Codes 1905. Plaintiff, without defendant's consent, bid such property at the foreclosure sale. Held, that the statutory manner of foreclosing such liens being the same as that prescribed for the foreclosure of liens on pledged property, plaintiff had no right in the absence of defendant's consent, to purchase the property at the sale, and such sale was therefore voidable at defendant's election. *Reeves & Co., v. Bruening*, 398.
8. The enactment of section 6296, Rev. Codes 1905, which provides generally that liens upon personal property may be foreclosed upon the notice and in the manner provided for the foreclosure of mortgages upon personal property, did not operate to repeal the special provision relating to the foreclosure of pledged property as contained in chapter 76 of the Civil Code (Rev. Codes 1905, sections 6193-6218). *Reeves & Co. v. Bruening*, 398.

LIMITATION OF ACTIONS.

1. Payment on the debt, or other acts which interrupt the running of the statute of limitations on the debt, also prevent the statute from running on the security. *Omlie v. O'Toole*, 126.
2. The assent of the wife is not necessary to an extension of the time of payment of a debt secured by mortgage on the homestead by the husband; and, without her assent, the husband can prevent the statute from running on the mortgage, *Omlie v. O'Toole*, 126.

MAINTENANCE. SEE CHAMPERTY AND MAINTENANCE, 193, 199.

MANDAMUS. SEE SUPREME COURT, 457.

1. A mandamus proceeding is not action under sections 6741, 6742, and 6743, Rev. Codes 1905, being a special proceeding. Under section 7229, Rev. Codes 1905, only actions are triable de novo in the Supreme Court, and this does not contemplate the trial de novo of special proceedings. *State v. Fabrick*, 94.
2. A statement of the case on appeal in a mandamus proceeding which does not contain specifications of error does not admit of a review of anything except the judgment roll. *State v. Fabrick*, 94.

MANSLAUGHTER. SEE CRIMINAL LAW, 426.

MARSHALING OF SECURITIES. SEE LIENS, 323.

MECHANIC'S LIEN.

1. A cause of action for equitable relief from a forfeited mechanic's lien may be joined with a cause of action to recover the penalty imposed by the statute for failing to release the lien on demand. *Sheets v. Prosser*, 180.
2. Equity will remove a cloud upon the title caused by the record of a mechanic's lien which has become forfeited by the lien claimant's failure to institute foreclosure proceedings upon demand, under section 4797, Rev. Codes 1899 (Sec. 6246, Rev. Codes 1905.) *Sheets v. Prosser*, 180.
3. Payment of the debt secured by a mechanic's lien will not be required as a condition to relief in an action to quiet title against it where the holder refuses to foreclosure upon demand under section 6246, Rev. Codes 1905. *Sheets v. Prosser*, 180.
4. In an action to recover the penalty imposed by section 4799, Rev. Codes 1899, for failure to discharge mechanic's lien of record, the complaint must state that the release which the lien claimant was notified to execute could have been executed by him without expense. *Sheets v. Prosser*, 180.
5. The provisions of chapter 101, p. 129, Laws 1901, giving a lien to materialmen and laborers upon buildings erected upon land occupied by persons pursuant to the land laws of the United States, is germane to the title to said law, being "an act regulating the filing and foreclosure of mechanic's liens upon lands held or occupied under a filing under any of the land laws of the United States," and does not contravene the provisions of section 61, article 2, constitution, providing that the subject of an act shall be expressed in its title. *Powers Elevator Co. v. Pottner*, 359.
6. An act giving to materialmen and laborers a lien upon buildings erected upon government lands held under the laws of the United States is not repugnant to the constitution, providing that all laws of a general nature shall have a uniform operation. *Powers Elevator Co. v. Pottner*, 359.
7. A materialman furnishing lumber to an occupant, as vendee under a contract for the purchase of land under the crop payment plan, to be used in the erection of a building thereon, is entitled to a lien on such building, and the vendee's interest in the land. *Salzer Lbr. Co. v. Claffin*, 601.

MECHANIC'S LIEN—Continued.

8. Under such circumstances, the vendee in the contract is deemed the owner of the land within the meaning of section 6248, Rev. Codes 1905. *Salzer Lbr. Co. v. Claflin*, 601.
9. Under such circumstances, the vendee of the land is the equitable owner of the land, and the vendor holds the legal title to the land in trust for the purchaser and as security for the payment of the purchase price. *Salzer Lbr. Co. v. Claflin*, 601.
10. The fact that the vendor terminated the contract after an action to foreclose the lien had been commenced under an arrangement with the vendee does not affect the lien, as the right to such lien must be determined as of the date of furnishing the materials. *Salzer Lbr. Co. v. Claflin*, 601.
11. The mechanic's lien law is remedial, and should be liberally construed to effectuate its purposes. *Salzer Lbr. Co. v. Claflin*, 601.

MERCHANTABLE TITLE.

1. A broker, to recover commission upon negotiating the purchase of land, must prove that he produced a person willing to sell at the agreed price, and was able to convey a merchantable title. *Anderson v. Johnson*, 174.

MERGER. SEE MORTGAGES, 42.

MINORS. SEE INFANTS, 83.

MORTGAGES. SEE FORECLOSURE, 19; SALES, 341; VENDOR AND PURCHASER, 601.

1. The mortgagees in such mortgage were designated under their firm name of Cook & Dodge, and, notwithstanding this fact, a statutory foreclosure thereof is sustained. *Cook v. Lockerby*, 19.
2. A mortgage appearing of record against the property is held, for reasons stated in the opinion, not to be a cloud on title. *Woodward v. McCollum*, 42.
3. An instrument in form a chattel mortgage, but evidently intended by the parties as security on real property, will be construed to be an equitable mortgage and will be enforced as such as between the parties thereto and those having notice thereof. *Standorf v. Shockley*, 73.
4. It is not necessary to reform such instrument in order to enforce the same in a suit in equity. *Standorf v. Shockley*, 73.
5. An instrument in form a deed may be proved by oral testimony to be a mortgage between the parties and all others with knowledge of its purpose. *Omlie v. O'Toole*, 126.
6. The assent of the wife is not necessary to an extension of the time of payment of a debt secured by mortgage on the homestead by the husband; and, without her assent, the husband can prevent the statute from running on the mortgage. *Omlie v. O'Toole*, 126.
7. A wife who joins husband in the execution of a mortgage on the homestead, given to secure his debt, does not thereby become a surety, and is not entitled to notice of an extension of the time for payment of the mortgage debt. *Omlie v. O'Toole*, 126.

MORTGAGES—Continued.

8. In an action to foreclose a deed given as security for debt, wherein the grantee, witness and the heirs at law of the grantor, since deceased, are adverse parties, testimony of the grantee that he paid interest on a prior mortgage and taxes on the mortgaged premises to protect the lien of his deed does not come within the statute disqualifying a party to an action from testifying to transactions had with a person since deceased. *Omlie v. O'Toole*, 126.
9. The grantee in an instrument in form a deed, but given to secure a debt, can pay interest on a prior mortgage and taxes necessary to protect his lien and the lien of his deed will attach to such payments. *Omlie v. O'Toole*, 126.
10. A deed absolute in form will be held to be a mortgage where the proof is clear, convincing and satisfactory that such was the intention of the parties. *Smith v. Jensen*, 408.
11. Where it is admitted that a deed absolute in form was not intended as an unconditional conveyance, but the controversy is as to whether the same was a mortgage or a conditional sale with the right to re-purchase the property at or before a future date, the same will ordinarily be held to be a mere security transaction, and therefore a mortgage, where the true character of such transaction is left in doubt by the evidence. *Smith v. Jensen*, 408.
12. Evidence examined and held to show the deed was intended as a mortgage. *Smith v. Jensen*, 408.
13. Evidence examined and held to establish that the deed was taken with full knowledge of its mortgage character, *Smith v. Jensen*, 408.
14. In an action by a vendor to have a deed, absolute in form, adjudged a mortgage, and asking for an accounting and right to redeem, the amount of indebtedness and right to redeem being in dispute, it is unnecessary for plaintiff to allege or prove a tender to defendant of any sum prior to the commencement of the action; it being sufficient for plaintiff to allege and prove a willingness to redeem by paying such sum as may be adjudged to be due and owing by him to defendant. *Smith v. Jensen*, 408.
15. In an action by a vendor to have a deed absolute in form adjudged a mortgage and the evidence as to the amount of indebtedness after deducting rents and profits being vague and uncertain, the District Court is directed to take an account of these matters and upon determining such sum, to enter judgment in accordance with the opinion. *Smith v. Jensen*, 408.

MOTION. SEE APPEAL AND ERROR, 138, 231; VERDICT, 420.

MUNICIPAL CORPORATIONS. SEE EMINENT DOMAIN, 313.

1. Debts of a city contracted for paving and sewer purposes are not to be computed in ascertaining whether the debt limit has been exceeded. There is no general liability against the city for such indebtedness, except for the one-fifth portion of the cost of paving. *Vallyelly v. Park Commissioners*, 25.
2. Bonds issued by an independent school district of the city of Grand Forks are not to be computed as debts of the city in ascertaining whether the debt limit has been exceeded. *Vallyelly v. Park Commissioners*, 25.

MUNICIPAL CORPORATIONS—Continued.

3. A law empowering a city council to determine by a vote whether the city will avail itself of the provisions of the law is not unconstitutional as a delegation to the council of legislative power. *Vallelly v. Park Commissioners*, 25.
4. The fact that 1905 law (Laws 1905, p. 256, chapter 143) creates a board to be appointed by the council whose powers over the control and government of parks are the same as those conferred by law upon the city council by former laws, does not render the 1905 law invalid. *Vallelly v. Park Commissioners*, 25.
5. A municipality has power to provide for the payment of annual interest on bonds to be issued by it, although the law authorizing the issue of such bonds does not expressly authorize it to make provision for the payment of such bonds or annual interest thereon. *Vallelly v. Park Commissioners*, 25.
6. An act of the legislative assembly authorizing a board appointed by the city council without the consent of the people to levy general taxes is unconstitutional as a delegation of legislative power. *Vallelly v. Park Commissioners*, 25.
7. The only question for the court is whether the particular property sought to be condemned by a city is necessary for public use. *Grafton v. Railway Co.*, 313.
8. The city council of respondent city passed an ordinance declaring it necessary to extend one of its streets across appellant's right of way in such city, and it is held that such ordinance was properly received in evidence; the same being competent for the purpose of proving the official determination by the council of the necessity for the crossing. *Grafton v. Railway Co.*, 313.
9. In an action to condemn property for street purposes the railway companies are not entitled to recover damages for structural changes, such as grading, approaches, planking crossing etc., made necessary by the opening of such street, the duty of making such changes being required by statute enacted under the police power of the state. Section 14, article 1, of the Constitution of this state, which provides that "private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner," does not require the allowance of such items of damage. *Grafton v. Railway Co.*, 313.
10. An ordinance may be proved as to its contents as well as to its passage by the council, by the introduction in evidence of the original record of such ordinance properly identified as such. *Grafton v. Railway Co.*, 313.

MURDER. SEE CRIMINAL LAW, 426.

NAMES.

1. In one of the deeds in plaintiff's chain of title the grantor signed his Christian name merely by initials, but the body of the deed set forth his full Christian name, as well as surname. This was sufficient. *Woodward v. McCollum*, 42.
2. One deed in the chain of title described the grantees as "Chauncey C., Frank E., and Henry S. Woodworth." Thus was sufficient to vest a two-thirds interest in Chauncey C. Woodworth and Frank E. Woodworth. *Woodward v. McCollum*, 42.
3. A deed from Henry S. Woodworth was signed "Harry" S. Woodworth, although in the body of the instrument the correct name was given. Held sufficient; the identity of the person being apparent. *Woodward v. McCollum*, 42.

NEGLIGENCE. SEE ASSIGNMENT, 38; PLEADING, 217; BAILMENT, 452.

1. A complaint in an action to recover damages for negligence must state the act of negligence complained of, and the plaintiff must recover, if at all, upon the particular act of negligence stated in the complaint. *Hall v. N. P. Ry. Co.*, 60.
2. Evidence examined, and held to be sufficient, under the rule heretofore established by this court, to require a submission to the jury of the question of defendant's negligence as alleged in the complaint. *Hall v. N. P. Ry. Co.*, 60.
3. It was properly a question for the jury to say under all the evidence whether or not plaintiff was guilty of negligence contributing to the injury complained of. *Hall v. N. P. Ry. Co.*, 60.
4. Contributory negligence as well as negligence of the defendant, are questions for the jury in a case at law, unless the conceded facts from which the inference must be drawn admit of only one conclusion. *Carr v. Soo Ry.*, 217.
5. If the facts relating to contributory negligence or to negligence of the defendant are such that different impartial minds might fairly draw different conclusions from them, they should be submitted to the jury, and are only for the court when such that fair-minded men might draw only one conclusion from them. *Carr v. Soo Ry.*, 217.
6. In an action for negligence of a railroad company in killing and injuring cattle on defendant's right of way by train, plaintiff's rested after proving the killing, injury and value; but on cross-examination of plaintiff's witnesses, by whom such proof had been made, it had been shown the plaintiff's buildings were one mile from the railway track; that the cattle in question were confined at the buildings during the night, but in the day time were driven south of the buildings and turned onto grass land according to custom; that they had never before the day in question been known to stray upon the defendant's right of way, but on the day of the accident they went upon the defendant's right of way, without the knowledge of the plaintiff's, and some were killed and others injured by one of defendant's trains. Held, that the question of plaintiff's negligence in turning their cattle out under the circumstances was for the jury. *Carr v. Soo Ry.*, 217.
7. In such a case, where there is a conflict in the evidence as to the time of day when the accident occurred, and as to whether the day was foggy or clear, and as to whether the train regarding which the defendant's witnesses testified was the one which did the damage, and as to other facts, it being conceded by the defendant's witnesses that they did not stop the train which they were running, and which killed cattle on that day and took no precaution to avoid injury after they discovered the cattle. Held, that the question of negligence on the part of the defendant was properly submitted to the jury, and the defendant's motion for a directed verdict was properly overruled. *Carr v. Soo Ry.*, 217.
8. In an action to recover for injuries to the person of the plaintiff by reason of the negligence of the defendant, while the plaintiff was a passenger riding in one of its cabooses, it was error justifying the trial court in granting a new trial to instruct the jury to take into consideration the loss of time occasioned plaintiff by the injuries complained of in fixing the amount of damages, when no loss of time was pleaded and no evidence offered showing the

NEGLIGENCE—Continued.

- value of his time, the extent of his business, or giving the jury any facts on which to base a finding for loss of time. *Barron v. N. P. Ry. Co.* 277.
9. Defendant sold to plaintiff a gallon of kerosene, with knowledge of the fact that one-ninth part thereof was gasoline. Plaintiff, with knowledge of the fact that a fire was burning in his stove poured some of the contents of the mixture directly from the can into the stove, causing an explosion of the vapors in the can, which severely injured him. Held, assuming that the oil was standard kerosene, that plaintiff as a matter of law was guilty of negligence which proximately contributed to the injury, and hence he cannot recover. *Morrison v. Lee*, 377.
 10. When the facts relating to negligence or contributory negligence are in dispute, and but one inference can reasonably be deduced therefrom the question of negligence or contributory negligence becomes a question of law for the court. *Morrison v. Lee*, 377.
 11. The standard from which to determine the question as to whether the plaintiff exercised such care as a reasonably prudent person would exercise under the like circumstances is the common knowledge and experience of men, and not the scientific knowledge and experience possessed by experts. *Morrison v. Lee*, 377.

NEGOTIABLE INSTRUMENTS. SEE SALES, 234, 341.

1. An indorsee of a promissory note can recover thereon without showing that he purchased the same in the 'due course of business, in the absence of any showing that he did not purchase the same in due course. *Kerr v. Anderson*, 36.
2. A legal presumption exists that the indorsee purchased the same in due course of business, and this presumption continues, unless his title is shown to be defective through fraud or other reasons. *Kerr v. Anderson*, 36.
3. An indorsement of a promissory note creates no liability of itself, and the indorser is not liable on the indorsement until presentment to the maker and notice to the indorser of such presentment. *Farquhar Co. v. Higham*, 106.
4. A person not a party to a promissory note, who indorses the same, assumes the obligations of an indorser only, and not those of a guarantor. *Farquhar Co. v. Higham*, 106.
5. Appellant, who was payee in certain promissory notes which were secured by a chattel mortgage, sold and transferred such notes, together with the mortgage and at the same time endorsed upon the back of the notes the following: "By agreement with recourse after all security has been exhausted, waiving protest. E. R. Bradley." Held, that such conditional indorsement obligated appellant to pay only such balance as might be due after the security has been exhausted. Held, further, that, until such security is exhausted, no cause of action accrues against such endorser, and therefore that he cannot be joined with the mortgagors as a defendant in an action to foreclose such mortgage. *Smith v. Shaw*, 306.

NEW TRIAL.

1. The insufficiency of the evidence to sustain the verdict cannot be raised for the first time on appeal, and not then until the particulars are pointed out on new trial proceedings. *McClain v. Nurnberg*, 144.
2. The correction of errors of law in framing and refusing special verdicts can only be made by appeal or motion for a new trial. *Olson v. Mattison*, 231.
3. In an action to recover for injuries to the person of the plaintiff by reason of the negligence of the defendant, while the plaintiff was a passenger riding in one of its cabooses, it was error justifying the trial court in granting a new trial to instruct the jury to take into consideration the loss of time occasioned plaintiff by the injuries complained of in fixing the amount of damages, when no loss of time was pleaded and no evidence offered showing the value of his time, the extent of his business, or giving the jury any facts on which to base a finding for loss of time. *Barron v. N. P. Ry. Co.* 277.
4. Evidence examined, and held, that the verdict is excessive as to certain sums, warranting the granting of a new trial unless such sums are remitted. *Aronson v. Opegard*, 595.

NOTES AND BILLS. SEE NEGOTIABLE INSTRUMENTS, 36, 106, 306; SALES, 341.

NOTICE. SEE WAIVER, 323.

1. An instrument in form a chattel mortgage, but evidently intended by the parties as security on real property, will be construed to be an equitable mortgage, and will be enforced as such as between the parties thereto and those having notice thereof. *Standorf v. Shockley*, 73.
2. A wife who joins husband in the execution of a mortgage on the homestead, given to secure his debt, does not thereby become a surety, and is not entitled to notice of an extension of the time for payment of the mortgage debt. *Omlie v. O'Toole*, 126.
3. Notice of the expiration of time for a redemption under a sale under the "Woods Law" is insufficient, when it erroneously describes the land and does not clearly apprise the owner that his land has been sold and that the time for redemption is about to expire. *State Finance Co. v. Trimble*, 199.
4. Various descriptions of land in assessment rolls and notices considered, and their sufficiency passed upon. *State Finance Co. v. Trimble*, 199.
5. Notices of tax sales and notices of the time when redemption will expire must describe the land involved in the tax, and such notices are not effectual without such description. *State Finance Co. v. Mulberger* 214.
6. Service of notice of the time when the period for redemption from a tax sale will expire on the holder of a void tax deed as owner is not effectual for any purpose. *State Finance Co. v. Mulberger*, 214.
7. Evidence examined and held to establish that the deed was taken with full knowledge of its mortgage character. *Smith v. Jensen*, 408.

OFFER OF PERFORMANCE. SEE RESCISSION, 10; TENDER, 199, 408.

OFFICERS. SEE CONTEMPT, 462.

1. In proceedings for removal of officers it is proper to object to the accusation on any ground assignable as a demurrer to a complaint. If such objections are overruled, answer must be filed and trial had in a summary manner. *State v. Richardson*, 1.
2. Accusation for removal from office for malfeasance must be presented by a grand jury. *State v. Richardson*, 1.
3. An accusation for removal of officers need not state all the facts and circumstances surrounding the alleged charge and collection of illegal fees, but a statement that said county commissioners "presented bills against said county for services, which were unlawfully and corruptly allowed by said defendants, acting as a majority of the board" and further pointing out the specific bills claimed as illegal, stating that said defendants "charged and collected" said bill from said county, state facts sufficient to constitute cause for removal. *State v. Richardson*, 1.
4. County commissioners can charge no more than one day for services performed from midnight to midnight, 24 hours; nor for time coming from and going to their regular sessions. Mileage only is allowed for such travel. *State v. Richardson*, 1.
5. That a county commissioner does not know that charges for his services are illegal is no excuse for making them. *State v. Richardson*, 1.
6. The order finding defendants guilty as they stand charged in paragraphs 17, 25 and 26, of the accusation, and that the defendants—naming them—be removed from office, is sufficient basis for a judgment of removal from office; and a judgment in practically the same language is sufficient, and it need not particularize specific acts of guilt. *State v. Richardson*, 1.
7. The respondent is not allowed costs for unnecessary reprinting of portions of abstract in brief. *State v. Richardson*, 1.
8. Under a law providing that the term of office of the county superintendent of schools shall be two years, and until his successor is elected and qualified, such official continues in office until his successor is elected and qualifies. *State v. Fabrick*, 94.
9. A county superintendent, lawfully holding over and continuing to perform the duties of the office is entitled to the compensation provided by law. *State v. Fabrick*, 94.
10. A person acting and recognized by the public as judge of the district court of the county in a new district, before the law establishing such new district has become operative, by appointment of the governor, under the erroneous belief that the new district was already in existence, is judge de facto, and his acts in that capacity valid as to third persons and the public. *State v. Ely*, 569.
11. Laws were passed defining the boundaries of the Ninth Judicial District and increasing the number of judicial districts from eight to ten. These laws took effect March 23, and July 1, 1907 respectively; but, by reason of conflicting provisions therein, the date when the new district should come into existence could not be ascertained from the fact of the laws. The governor construed them as creating a new district on the first day of July, 1907, and appointed a

OFFICERS—Continued.

judge thereof, who duly qualifed and entered upon the discharge of the duties of judge of such district on or about July 1, 1907, in good faith, and the judges of the Second and Eighth districts ceased to perform judicial duties in the counties which will compose the Ninth District. From an inspection of that part of the journals of the legislative assembly showing the proceedings in the passage of these laws, this court has determined that the intent of that body was that the new laws creating the new district and defining its boundaries should be held in obedience until the election and qualification of a judge as therein provided. Held, that the person so appointed judge, and acting and recognized as such, was a judge de facto, and his official acts valid. *State v. Ely*, 569.

12. On application for writ of habeas corpus by a person convicted and sentenced at a term of court held by a de facto, but not de jure judge, and imprisoned under a judgment rendered therein, held, that the relief cannot be granted and the application must be denied. *State v. Ely*, 569.
13. The prima facie presumption that an affidavit is sworn to in the county named in its caption or venue is overcome by the presumption that an officer's acts are performed at the county where he is legally authorized to act. *Salzer Lumber Co. v. Claflin*, 601.

ORDINANCE. SEE EVIDENCE, 313.

PARTIES. SEE REFERENCE, 551; QUO WARRANTO, 581.

1. Appellant, who was payee in certain promissory notes which were secured by a chattel mortgage, sold and transferred such notes, together with the mortgage, and at the same time endorsed upon the back of the notes the following: "By agreement with recourse after all security has been exhausted, waiving protest. E. R. Bradley." Held, that such conditional endorsement obligated appellant to pay only such balance as might be due after the security has been exhausted. Held, further, that, until such security is exhausted, no cause of action accrues against such endorser, and therefore that he cannot be joined with the mortgagors as a defendant in an action to foreclose such mortgage. *Smith v. Show*, 396.
2. The mortgagor is a proper party plaintiff in a suit to secure application of the proceeds derived from the security for debts secured by the various liens in the order of their priority; and, conceding that a party of the lienholders might properly have been joined as plaintiff, or might have maintained independent actions to secure their rights, it is too late for defendants to first object in the Supreme Court to their non-joinder as plaintiffs. *Gordon v. Goldamer*, 323.

PARTNERSHIP. SEE FORECLOSURE, 19.

1. A partner has no power, as such alone, to sell the good will of the partnership business. *Kelly v. Pierce*, 234.
2. The fact that the contract of partnership between the defendants, if any existed, was for an illegal purpose, to-wit: the unlawful traffic in intoxicating liquors, is not sufficient to defeat a recovery by plaintiffs, in the absence of proofs that they were connected in some way with such illegal contract. *Frankel v. Hiller*, 387.

PARTNERSHIP—Continued.

3. The question as to whether the defendants were co-partners as alleged in the complaint is a mixed question of law and fact, and under the evidence the court could not determine such question as a matter of law. The respondent furnished the building and lot upon which such illegal business was conducted under an agreement with his co-defendant that he should receive one-half of the net profits of the business. Held, under the evidence, that it was for the jury to say what the intention of the parties was; such intention, when ascertained, being largely controlling. *Frankel v. Hillier*, 387.
4. Less proof is requisite to establish a partnership in actions against alleged partners than is necessary in an action between the parties themselves. *Frankel v. Hillier*, 387.
5. The mere organization of a corporation with a view of taking over the business and property of a co-partnership does not of itself transfer the title of the partnership property to the corporation. *Ruettell v. Ins. Co.*, 546.
6. Evidence considered, and held, not to show a transfer of the title to partnership property to a corporation formed for that purpose. *Ruettell v. Ins. Co.*, 546.

PAYMENT.

1. Payment on the debt, or other acts which interrupt the running of the statute of limitations on the debt, also prevent the statute from running on the security. *Onlie v. O'Toole*, 126.

PENALTY

1. A cause of action for equitable relief from a forfeited mechanic's lien may be joined with a cause of action to recover the penalty imposed by the statute for failing to release the lien on demand. *Sheets v. Prosser*, 180.

PERSONAL PROPERTY. SEE SALES, 10, 234; CONTRACT, 256,
LIENS, 398.

PHOTOGRAPHS. SEE EVIDENCE, 446.

PHYSICIANS. SEE WITNESS, 83.

PLEADING. SEE JUDGMENT, 36; ACTION, 38; INTERVENTION,
595.

1. An accusation for removal of officers need not state all the facts and circumstances surrounding the alleged charge and collection of illegal fees, but a statement that said county commissioners "presented bills against said county for services, which were unlawfully and corruptly allowed by said defendants acting as a majority of the board" and further pointing out the specific bills as illegal, stating that said defendants "charged and collected" said bills from said county, states facts sufficient to constitute cause for removal. *State v. Richardson*, 1.

PLEADINGS—Continued.

2. Plaintiff at the trial asked leave to amend his complaint by setting up a cause of action accruing to M. and alleging an assignment thereof to him prior to the commencement of the action. This amendment would entirely change the cause of action, and hence was properly refused. Such proposed amendment was also inconsistent with the proof already introduced by plaintiff, which showed that such assignment was not made until after the action was commenced, and should for that reason have been denied. *Woodward v. N. P. Ry. Co.*, 38.
3. Upon cross examination of plaintiff, it was disclosed that one Chamberlain is to receive twenty-five per cent of any sum plaintiff may recover in this action, and defendant contends that this should defeat plaintiff's recovery. The answer to this contention is the fact that no such defense was pleaded in the answer, and furthermore no ruling was made; nor was the trial court asked to make any ruling upon which such assignment of error could be predicated. *Kepler v. Ford*, 50.
4. A complaint in an action to recover damages for negligence must state the act of negligence complained of, and the plaintiff must recover, if at all, upon the particular act of negligence stated in the complaint. *Hall v. N. P. Ry. Co.*, 60.
5. When essential averments are omitted from the complaint and supplied by the answer, such defects in the complaint are cured. *Omlie v. O'Toole*, 126.
6. Action of trial court in amending complaint after evidence is all introduced to make it conform to the proof, when such amendment makes no substantial change in the claim, will not be reviewed on appeal, unless an abuse of discretion is apparent. Held, under the circumstances surrounding making of such amendment in this case, no abuse of discretion appears. *Omlie v. O'Toole*, 126.
7. Where an appeal from a judgment in justice court for possession of certain premises and rent is pending in the district court, it is a bar to a second action for such possession and rent for the same period, when pleaded in abatement. *McClain v. Nurnberg*, 138.
8. Where the trial court grants leave to amend a complaint and to file the former amended complaint at a later time, and the trial proceeds on the theory that the complaint has been regularly amended, and no objection is made to the irregularity until the case reaches the Supreme Court on appeal, the irregularity is waived. *McClain v. Nurnberg*, 144.
9. Defendant does not waive such want of jurisdiction by pleading guilty to the charge thus insufficiently alleged. *State v. Newton*, 151.
10. In an action to recover a statutory penalty, the complaint must clearly indicate the statute by virtue of which the penalty is claimed. *Sheets v. Prosser*, 180.
11. In an action to recover the penalty imposed by section 4799, Rev. Codes 1899, for failure to discharge mechanic's lien of record, the complaint must state that the release which the lien claimant was notified to execute could have been executed by him without expense. *Sheets v. Prosser*, 180.
12. As a recital of the contents of a written notice, which the complaint alleges was served, is not equivalent to a direct allegation that the facts were as stated in such notice. *Sheets v. Prosser*, 180.

PLEADINGS—Continued.

13. Contributory negligence is a matter of defense, and should be pleaded. *Carr v. Soo Ry.*, 217.
14. In an action to recover for injuries to the person of the plaintiff by reason of the negligence of the defendant, while the plaintiff was a passenger riding in one of its cabooses, it was error justifying the trial court in granting a new trial to instruct the jury to take into consideration the loss of time occasioned plaintiff by the injuries complained of in fixing the amount of damages, when no loss of time was pleaded and no evidence offered showing the value of his time, and extent of his business, or giving the jury any facts on which to base a finding for loss of time. *Barron v. N. P. Ry. Co.*, 277.
15. A complaint in an action brought by the assignee of remote grantee to recover damages for breach of covenants in a deed to real property, which the complaint alleges that the covenantor neither had title to nor possession of at the time of the execution and delivery of such deed, and fails to allege any transfer of such cause of action by the covenantor or plaintiff's assignor, does not state facts sufficient to constitute a cause of action. *Bull v. Beiseker*, 290.
16. In order to recover in such an action, plaintiff must allege and prove either privity of estate or of contract. *Bull v. Beiseker*, 290.
17. Under section 7592 Rev. Codes 1905, the complaint in an action by a city to condemn property for street crossing need not allege the public necessity for the crossing sought to be opened. *Grafton v. Ry. Co.*, 313.
18. In an action by wholesale liquor dealers located in Minnesota to recover the purchase price of intoxicating liquors sold to persons residing in this state, the answer, in addition to general denial, alleged that such sales were made in North Dakota, and therefore void under the provisions of section 7621, Rev. Codes 1899. Held, that such sales took place in Minnesota, the liquors having been delivered f. o. b. cars at St. Paul, pursuant to orders sent to plaintiffs at that place. *Frankel v. Hillier*, 387.
19. Where neither the contract sued upon, upon its face, nor plaintiff's evidence disclosed, that such contract was illegal, it is error to direct a verdict on such ground. *Frankel v. Hillier*, 387.
20. In an action by a vendor to have a deed, absolute in form, adjudged a mortgage, and asking for an accounting and right to redeem, the amount of indebtedness and right to redeem being in dispute, it is unnecessary for plaintiff to allege or prove a tender to defendant of any sum prior to the commencement of the action; it being sufficient for the plaintiff to allege and prove a willingness to redeem by paying such sum as may be adjudged to be due and owing by him to defendant. *Smith v. Jensen*, 408.
21. It is not error to deny a motion for a directed verdict or for a judgment notwithstanding the verdict, when the evidence shows a conflict as to whether the cause of action pleaded has been proven. *Higgs v. Soo Ry. Co.*, 446.
22. Under a contract of hire between bailor and bailee that the bailee will return a stallion in as good condition as when received or pay for it, a complaint states a cause of action when it pleads such contract, refusal to perform after demand, without any allegation of negligence. *Grady v. Schweinler*, 452.

PLEADINGS—Continued.

23. Plaintiff seeks to recover a sum claimed to be due him for services performed under an alleged contract, by the terms of which he was to receive, in addition to a monthly allowance, ten per cent of the net profits of defendant bank during his employment. The answer put in issue the terms of the contract, as stated in the complaint, and alleged that plaintiff was to receive ten per cent commission of all net profits, over and above a twelve per cent dividend upon the defendant's capital stock, after charging off all losses and bad debts. The answer also alleged payment in full, and also contained the usual qualified denial of all the allegations of the complaint not admitted, qualified and explained. Held, that the issues thus raised did not justify the trial court in ordering a compulsory reference. *Dreveskracht v. Bank*, 555.

PLEDGE. SEE LIENS, 398.

POLICE POWER. SEE RAILROADS, 313; CONSTITUTIONAL LAW, 347.

1. The action in question, which requires publicity to be given of the fact of the payment of such government tax, is a legitimate exercise by the state legislature of the police power of the state, as it tends to aid in the enforcement of the law against the unlawful traffic in intoxicating liquors. *State v. Hanson*, 347.

POSSESSION. SEE FORECLOSURE, 290; STATUTE OF FRAUDS, 551.

PRACTICE.

1. In proceedings for removal of officers it is proper to object to the accusation on any ground assignable as a demurrer to a complaint. If such objections are overruled, answer must be filed and a trial had in a summary manner. *State v. Richardson*, 1.
2. The order finding defendants guilty as they stand charged in paragraphs 17, 25 and 26, of the accusation and that they, defendants—naming them—be removed from office, is sufficient basis for a judgment of removal from office; and a judgment in practically the same language is sufficient, and it need not particularize specific acts of guilt. *State v. Richardson*, 1.
3. Both parties moved for a directed verdict and defendant's motion was granted. Subsequently plaintiff's motion for judgment notwithstanding the verdict was granted; later this motion was refused and a similar one for plaintiff granted. Held, that the court had jurisdiction to do this and no error was committed. *Sim v. Rosholt*, 77.
4. A compulsory reference of an issue under the provisions of section 7047, Rev. Codes 1905, is not permissible unless it appears that the trial of such issue will necessitate the examination of a long account between the parties. It is not sufficient that it appears that the trial *may* involve the examination of a long account; but it must affirmatively appear that it *will* do so. *Dreveskracht v. Bank*, 555.
5. In an action by a landlord for the conversion of grain raised by his tenant under a written lease providing that the title to the grain shall be in the landlord until the division thereof, and that he can hold it until paid for all advances to the tenant under the lease; and before division the tenant mortgages his undivided one-half to a third person and the mortgagee takes the grain and sells it under his mortgage, through an agent; upon the latter's intervention he is not entitled to trial by the court where no equitable issues were presented by the pleadings. *Aronson v. Oppegard*, 595.

PREJUDICE. SEE EVIDENCE, 50.

1. Certain admonitions by the trial judge to the defendant, while on the witness stand, but not in the presence or hearing of the jury, were not prejudicial to the rights of defendant. *Zink v. Lahart*, 56.

PRELIMINARY EXAMINATION. SEE CRIMINAL LAW, 204.

1. A preliminary examination of a person accused of crime is not a trial within the meaning of that term in section 10216, Rev. Codes 1905. *Harris v. Rolette county*, 204.

PREROGATIVE WRIT. SEE QUO WARRANTO, 168; SUPREME COURT, 457.

PRESUMPTION. SEE EVIDENCE, 601.

PRIMARY ELECTIONS. SEE ELECTIONS, 363.

PRINCIPAL AND AGENT. SEE ATTORNEY AND CLIENT, 144, 323; SALES, 341.

PRINCIPAL AND SURETY.

1. A wife who joins husband in the execution of a mortgage on the homestead, given to secure his debt, does not thereby become a surety, and is not entitled to notice of an extension of the time for payment of the mortgage debt. *Omlie v. O'Toole*, 126.

PRIVILEGED COMMUNICATION. SEE EVIDENCE, 83; WITNESS, 126.

PRIVITY. SEE WARRANTY, 290.

PUBLIC LANDS.

1. In all cases of disputed boundary lines, evidence of the location of the original monuments which were established by the government surveyors controls over plats, field notes and all other evidence as to the proper location of such lines, when the point where such monuments were thus located can be definitely established. *Propper v. Wohlwend*, 110.
2. There was a substantial conflict in the evidence as to whether the original government monument marking the south end of the quarter section lines between the lands of plaintiff and defendant was established at the point contended for by the plaintiff or at the point contended for by defendant, and hence it was error to direct a verdict. *Propper v. Wohlwend*, 110.
3. The provisions of chapter 101, p. 129, laws of 1901, giving a lien to materialmen and laborers upon buildings erected upon land occupied by persons pursuant to the land laws of the United States, is germane to the title to said law, being "an act regulating the filing and foreclosure of mechanic's liens upon lands held or occupied under a filing under any of the land laws of the United States," and does not contravene the provisions of section 61, article 2, constitution, providing that the subject of an act shall be expressed in its title. *Powers Elevator Co. v. Pottner*, 359.

PUBLIC LANDS—Continued.

4. An act giving to materialmen and laborers a lien upon buildings erected upon government lands under the laws of the United States is not repugnant to the constitution, providing that all laws of a general nature shall have a uniform operation. *Powers Elevator Co. v. Pottner*, 359.
5. Resurvey of lands must be in accordance with the laws of the United States and the instructions issued by the officers thereof in charge of the government land surveys. *Rev. Codes 1905, section 2540. Nystrom v. Lee*, 561.
6. The official instructions to United States surveyors for locating and relocating quarter section corners on interior sections require them to be established equidistant from section corners. Hence, in absence of other evidence, when one corner and the quarter corner are found, the lost section corner will be presumed to have been located the same distance from the quarter corner as the latter is found to be from the existing corner. *Nystrom v. Lee*, 561.
7. When the northwest, northeast and southwest corners of an interior section and the west and north quarter corners are found or established, and a point on a line runs one mile due south from the northeast corner of the section is found to be just one mile east of the southwest corner, such point, in the absence of conflicting evidence, will be presumed to be the original southeast section corner and the points midway between that point and the established corners the south and east corners. *Nystrom v. Lee*, 561.

QUIETING TITLE.

1. Equity will remove a cloud upon the title caused by the record of a mechanic's lien which has become forfeited by the lien claimant's failure to institute foreclosure proceedings upon demand, under section 4797, *Rev. Codes 1899. (Sec. 6246, Rev. Codes 1905). Sheets v. Prosser* 180.
2. Where a tract of land, comprised of smaller tracts owned by different parties whose titles are of record, is assessed in a body in the name of one of the separate owners only, the assessment is inherently defective, and no tender of the taxes justly due is essential to the maintenance of an action to quiet title. *State Finance Co. v. Bowdle*, 193.

QUO WARRANTO.

1. The writ of quo warranto will only be issued by this court as a prerogative writ and not at the request of a private relator, except in very exceptional cases. *State v. Nohle*, 168.
2. The issuance of writs of quo warranto by the Supreme Court is wholly discretionary and will be denied upon grounds of public policy, where the issuance would result in no perceivable benefit to the relator or others, but would result in great detriment to a large number of people and would lead to much strife, confusion and litigation. *State v. Nohle*, 168.
3. Where the governor of the state appoints a judge of the district court under a law providing that the office shall be filled by a general election, and a private relator applies for leave to file an application for a writ in the nature of a writ of quo warranto, on the ground that he has suits pending of strictly personal nature, and that the public are interested and that the sovereignty of the state is

QUO WARRANTO—Continued.

affected, this court will assume original jurisdiction under section 87, art. 4, of the constitution although the attorney general refuses to consent that said private relator may apply for leave to file the application for such writ in the name of the state. *State v. Burr*, 581.

RAILROADS.

1. In an action for negligence of a railroad company in killing and injuring cattle on defendant's right of way by train, plaintiffs rested after proving the killing, injury, and value; but on cross examination of plaintiff's witnesses, by whom such proof had been made, it had been shown that plaintiffs' buildings were one mile from the railway track; that the cattle in question were confined at the buildings during the night, but in the day time were driven south of the buildings and turned onto grass land according to custom; that they had never before the day in question been known to stray upon the defendant's right of way, but on the the day of the accident they went upon the defendant's right of way, without the knowledge of the plaintiffs, and some were killed and others injured by one of defendant's trains. *Held*, that the question of plaintiffs' negligence in turning their cattle out under the circumstances was for the jury. *Carr v. Soo Ry.* 217.
2. In such a case, where there is a conflict in the evidence as to the time of day when the accident occurred, and as to whether the day was foggy or clear, and as to whether the train regarding which the defendant's witnesses testified was the one which did the damage, and as to other facts, it being conceded by the defendant's witnesses that they did not stop the train which they were running, and which killed cattle on that day and took no precaution to avoid injury after they discovered the cattle, held, that the question of negligence on the part of the defendant was properly submitted to the jury, and the defendant's motion for a directed verdict was properly overruled. *Carr v. Soo Ry.*, 217.
3. In an action to condemn property for street purposes the railway companies are not entitled to recover damages for structural changes, such as grading, approaches, planking, crossing etc. made necessary by the opening of such street, the duty of making such changes being required by statute enacted under the police power of the state. Section 14, art. 1, of the Constitution of this state, which provides that "private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner," does not require the allowance of such items of damage. *Grafton v. Ry. Co.*, 313.

RAPE. SEE CRIMINAL LAW, 83.

REAL ESTATE. SEE VENDOR AND PURCHASER, 42; TAXATION, 199, 214; HOMESTEAD, 208; DEEDS, 290; FORECLOSURE, 290; CRIMINAL LAW, 420; STATUTE OF FRAUDS, 551.

1. A clause in a quit claim deed to the effect that the grantor makes no representations as to his title is not a disclaimer of title, nor does it show a prior abandonment of the land. *State Finance Co. v. Bowdle*, 193.

REASONABLE DOUBT. SEE CRIMINAL LAW, 426.

RECORDING TRANSFERS. SEE TAXATION, 193.

1. An assessment of one tract of land, comprising two smaller tracts owned by different persons whose titles are of record, is a nullity. *State Finance Co. v. Bowdle*, 193.
2. Each tract of land owned by different parties whose titles are of record must be separately assessed. *State Finance Co. v. Bowdle*, 193.
2. Where a tract of land, comprised of smaller tracts owned by different parties whose titles are of record, is assessed in a body in the name of one of the separate owners only, the assessment is inherently defective, and no tender of the taxes justly due is essential to the maintenance of an action to quiet title. *State Finance Co. v. Bowdle*, 193.
4. A deed is not void or champertous, under section 8733, Rev. Codes 1905, where an attorney for the grantee examines the records before the deed is given and discovers defects in tax deeds of record on which title is claimed. *State Finance Co. v. Bowdle*, 193.
5. The mere fact that a grantee of a deed of vacant land examined the records of the office of the register of deeds before purchasing the land, and thereby discovered defects in defendant's titles, does not rener the deed void for maintenance. *State Finance Co. v Trimble*, 199.

REDEMPTION. SEE TAXATION, 199, 214; MORTGAGES, 408.

REFERENCE.

1. A compulsory reference of an issue under the provisions of section 7047, Rev. Codes 1905, is not permissible unless it appears that the trial of such issue will necessitate the examination of a long account between the parties. It is not sufficient that it appears that the trial may involve the examination of a long account; but it must affirmatively appear that it will do so. *Dreveskracht v. Bank*, 555.
2. To authorize an order of reference upon the ground that the trial will require the examination of a long account within the meaning of said statute, the account must be one arising between the parties, and must be directly, and not merely collaterally, involved in the trial. *Dreveskracht v. Bank*, 555.
3. Plaintiff seeks to recover a sum claimed to be due him for services performed under an alleged contract, by the terms of which he was to receive, in addition to a monthly allowance, 10 per cent of the net profits of defendant bank during his employment. The answer put in issue the terms of the contract, as stated in the complaint, and alleged that plaintiff was to receive 10 per cent commission of all net profits, over and above a 12 per cent dividend upon the defendant's capital stock, after charging off all losses and bad debts. The answer also alleged payment in full, and also contained the usual qualified denial of all allegations of the complaint not admitted, qualified or explained. Held, that the issues thus raised did not justify the trial court in ordering a compulsory reference. *Dreveskracht v. Bank*, 555.

REFORMATION OF INSTRUMENTS. SEE CONTRACT, 50.

1. An instrument in form a chattel mortgage evidently intended by the parties as security on real property may be enforced in equity without reformation. *Standorf v. Shockley*, 73.

REMEDY.

1. If a grantor assumes to convey real property with full covenants of warranty when he has neither title nor possession, there is at once a constructive eviction of the grantee, which entitled him to the same remedies which he would have had if he had been evicted from actual possession. *Bull v. Beiseker*, 290.

REMOVAL FROM OFFICE. SEE OFFICERS, 1.

REPLEVIN.

1. In an action in claim and delivery in which the issues were as to the right of possession, damages, and the right to and the amount of the lien claimed on the property in suit, the jury returned a verdict as follows: "We, the jury in said action, do hereby find for the defendant in the sum of \$12.00." Held, that this verdict is not responsive to the issues, and was not in law a verdict. *Johnson v. Glaspey*, 335.

RESCISSION.

1. A sale of personal property followed by actual delivery cannot be rescinded unless the property be promptly returned to the seller or its return tendered and refused, or its return waived. *Owens v. Doughty*, 10.
2. Mere words of disaffirmance followed by positive acts acquiescing in the contract will not effect a rescission of the same. *Owens v. Doughty*, 10.
3. A contract of sale of personal property cannot generally be rescinded by a return or an offer to return only that part of the property unsold. *Owens v. Doughty*, 10.
4. A rescission of a contract must generally be of the contract in its entirety, and not that part which is advantageous to the party. *Owens v. Doughty*, 10.

RESIDENCE. SEE HOMESTEAD, 208.

1. Residence upon land is generally necessary before a homestead therein can be claimed as exempt. *Smith v. Spafford*, 208.

SALES. SEE WARRANTY, 248.

1. A sale of personal property followed by actual delivery cannot be rescinded unless the property be promptly returned to the seller or its return tendered and refused, or its return waived. *Owens v. Doughty*, 10.
2. A contract of sale of personal property cannot generally be rescinded by a return or an offer to return only that part of the property unsold. *Owens v. Doughty*, 10.
3. A bill of sale construed, and the rights of the parties thereunder determined. *Owens v. Doughty*, 10.
4. A vendee who refuses to perform his agreement to execute notes for the purchase price of personal property sold and delivered to him, may be sued by the vendor for damages for breach of the contract immediately upon the refusal to deliver the notes, and the measure of damages will be the contract price. *Kelly v. Pierce*, 234.

SALES—Continued.

5. Respondent purchased two horses of appellant, who represented a discharge from their nostrils as being caused by a cold caught in swimming the Missouri, and stated that they were sound, and would be all right in a day or two, in answer to respondent's inquiry as to the cause of the discharge. Held, that if there was doubt as to this representation being a warranty, it was a proper question for submission to the jury. *Larson v. Calder*, 248.
6. Conviction, under section 9077, Rev. Codes 1905, is not a necessary prerequisite to the maintenance of an action for damages for breach of warranty of horses against the disease known as "glanders." *Larson v. Calder*, 248.
7. It is not necessary to allege or prove in an action for a breach of warranty against an infectious disease that the vendor had knowledge of the infection at the time of the sale. *Larson v. Calder*, 248.
8. Defendant signed and delivered to plaintiff's agents a written order for certain machinery, to be delivered on condition specified therein. The order was an offer to purchase which became an absolute contract of sale after acceptance. Plaintiff was ready to deliver the machinery under the order, but defendant refused to accept it unless he was given an opportunity to test the working of the machine by a trial. Plaintiff's agents entered into a new contract with defendant under the same terms as embodied in the order, except that defendant was given the right to test the working of the machine, which was accordingly delivered to defendant. Under these conditions, defendant gave plaintiff his notes and mortgage security, which were to be left with a bank; delivery thereof to abide the event of the trial. The machine did not work satisfactorily and was returned to plaintiff. Plaintiff brings this action to foreclose the mortgage, claiming an absolute delivery of the machine.

Held:

- (1.) That there was no delivery of the machine under the written order.
- (2.) That the delivery of the machine was under the oral contract, which was subject to conditions.
- (3.) That the question of the authority of the agents to modify a written order is not involved in the case.
- (4.) That the notes and mortgage never became a contract binding on the defendant.
- (5.) That the title to the machine contracted to be sold did not pass to the defendant as the delivery was conditional. *Coleman Mfg. Co. v. Blanchett*, 341.
9. In an action by wholesale liquor dealers located in Minnesota to recover the purchase price of intoxicating liquors sold to persons residing in this state, the answer, in addition to a general denial, alleged that such sales were made in North Dakota, and therefore void under the provisions of section 7621, Rev. Codes 1899. Held, that such sales took place in Minnesota, the liquors having been delivered f. o. b. cars at St. Paul, pursuant to orders sent to plaintiffs at that place. *Frankel v. Hillier*, 387.
10. Under the provisions of section 9390, Rev. Codes 1905, mere knowledge by the vendor of intoxicating liquors lawfully sold in one state that the vendee intends to resell them in violation of the law of another state, is not sufficient to defeat an action brought in the latter state by the vendor against the vendee to recover the purchase price thereof. In order to defeat such action for the

SALES—Continued.

purchase price it must appear that the vendor intended by such sale, in some manner no matter how slight, to aid the vendee in his unlawful design to violate the laws of this state. *Frankel v. Hillier*, 387.

11. Plaintiff agreed to sell to defendant, and defendant agreed to purchase from plaintiff, a certain threshing rig, and, upon defendant's refusal to accept and settle for such property, plaintiff proceeded to enforce a vendor's lien for the purchase price pursuant to section 6284, Rev. Codes 1905. Plaintiff, without defendant's consent, bid such property in at the foreclosure sale. Held that, the statutory manner of foreclosing such liens being the same as that prescribed for the foreclosure of liens on pledged property, plaintiff had no right in the absence of defendant's consent, to purchase the property at the sale, and such sale was therefore voidable at defendant's election. *Reeves & Co. v. Bruening*, 398.

SCHOOLS AND SCHOOL DISTRICTS. SEE MUNICIPAL CORPORATIONS, 25.

SEED LIENS. SEE LIENS, 185.

SENTENCE. SEE JUDGMENT, 420.

SPECIAL PROCEEDINGS.

1. A mandamus proceeding is not an action under sections 6741, 6742, and 6743, Rev. Codes 1905, being a special proceeding. Under section 7229, Rev. Codes 1905, only actions are triable de novo in the Supreme Court, and this does not contemplate the trial de novo of special proceedings. *State v. Fabrick*, 94.

SPECIFIC PERFORMANCE. SEE VENDOR AND PURCHASER, 42; STATUTE OF FRAUDS, 551.

1. Evidence held to justify the findings of the trial court. *Connolly v. Luros*, 16.
2. In an action to compel specific performance of a contract for the purchase of real property, the vendee defended upon the ground among others, that the vendor could not transfer to him a title free from reasonable doubt in conformity to Rev. Codes 1899, section 5032. Held, that such defense was not established. *Woodward v. McCollum*, 42.
3. A barn on the premises was destroyed by fire after the contract for deed was executed without the fault of either part, and it is held that this fact does not prevent specific performance of the contract as the loss must be borne by the vendee; he being the beneficial owner in equity of the property. *Woodward v. McCollum*, 42.
4. A part performance to take the contract out of the statute of frauds the change of possession must be actual, open, and notorious, to support an action for specific performance of an oral contract to convey land. *Muir v. Chandler*, 551.

STATEMENT OF THE CASE.

1. A statement of the case on appeal in a mandamus proceeding which does not contain specifications of error does not admit of a review of anything except the judgment roll. *State v. Fabrick*, 94.

STATES. SEE SUPREME COURT, 457.

1. In all matters relating to the life, liberty, and the property of the citizen, the state is sovereign, so long as it does not conflict with the federal constitution. *State v. Hanson*, 347.

STATE'S ATTORNEY. SEE GRAND JURY, 470.

STATUTE OF FRAUDS.

1. A part performance to take the contract out of the statute of frauds the change of possession must be actual, open, and notorious, to support an action for specific performance of an oral contract to convey land. *Muir v. Chandler*, 551.
2. Where the vendor is in possession of land contracts orally to convey it to the vendee, an oral lease does not constitute a part performance sufficient to take the transaction out of the statute of frauds. *Muir v. Chandler*, 551.

STATUTE OF LIMITATIONS. SEE LIMITATIONS OF ACTIONS, 126.

STATUTES.

1. In proceedings under section 9646, Rev. Codes 1905, or section 7838, Rev. Codes 1899, for the removal of public officials, it is proper to object to the accusation on any ground one might assign by way of demurrer to a complaint. If objections to the accusation are overruled, an answer must be filed and trial had in a summary manner. *State v. Richardson*, 1.
2. It is not necessary that an accusation under section 9646, Rev. Codes 1905, should contain all the facts and circumstances surrounding the alleged charge and collections of illegal fees by public officials, but a statement that said county commissioners "presented bills against said county for their services, which were unlawfully and corruptly allowed by said defendants acting as a majority of said board of county commissioners," and further pointing out the specific bills, claimed as illegal, stating that said defendants "charged and collected" said bills from said county, states sufficient facts to constitute cause for removal. *State v. Richardson*, 1.
3. An affidavit of publication of notice of sale in proceedings to foreclose a real estate mortgage, which recites that such notice was published "seven successive times, commencing on July 17, 1885, and ending on August 28, 1885, both inclusive, in the Lisbon Star a weekly newspaper," is sufficient proof that it was published once in each week for six successive weeks, as required by Comp. Laws 1887, section 5414. *Cook v. Lockerby*, 19.
4. The fact that the 1905 law (Laws 1905, page 256, chapter 143) creates a board to be appointed by the council whose powers over the control and government of parks are the same as those conferred by law upon the city council by former laws, does not render the 1905 law invalid. *Vallclly v. Park Commissioners*, 25.

STATUTES—Continued.

5. In an action to compel specific performance of a contract for the purchase of real property, the vendee defended upon the ground among others, that the vendor could not transfer to him a title free from reasonable doubt in conformity to Rev. Codes 1899, section 5032. Held, that such defense was not established. *Woodward v. McCollum*, 42.
6. A complaint in an action upon a judgment of a justice of the peace of a sister state which fails to allege specifically the facts showing that such court had jurisdiction, both of the subject matter and of the person of the defendant, or that such judgment was duly "given or made," as provided in section 6871, Rev. Codes 1905, or words of the exact equivalent, fail to state facts sufficient to constitute a cause of action. *Strecker v. Railson*, 68.
7. A judgment rendered by a justice of the peace of a sister state cannot be proved in this state by an authenticated copy of the record of such justice's court, as neither the act of Congress, nor section 7292, Rev. Codes 1905, relates to the authentication of copies of records of courts of limited jurisdiction in other states. *Strecker v. Railson*, 68.
8. Under section 1821, Rev. Codes 1905, relating to the establishment of drains, the jurisdiction of the board of drain commissioners to order such drain is acquired by the filing with the board of a petition as therein required, and after such jurisdiction is thus acquired and the board has taken action thereunder, it cannot be divested of such jurisdiction by the action of the petitioners in withdrawing their names from the petition. *Sim v. Rosholt*, 77.
9. Following the rule announced in *State v. Ekanger*, 80 N. W. 482, 8 N. D. 559, it is held that a juror, who states on his voir dire that he has formed and entertains an opinion as to the guilt or innocence of the accused which it will require some evidence to remove, is not disqualified from serving, where it appears that such opinion is based wholly upon newspaper accounts of the transaction and common street gossip, provided it satisfactorily appears to the court that the juror can, and will if accepted, notwithstanding such opinion, fairly and impartially try the case on the testimony adduced and the law as given by the court. *State v. Werner*, 83.
10. The prosecution was permitted, over defendant's objection, to prove by the witness Dr. Todd a certain conversation had between the witness, the defendant and the state's attorney, for the purpose of showing certain admissions of the defendant that he was afflicted with a loathsome disease which the state claimed was communicated by him to this girl. The gist of this conversation was as follows: Mr. Thorp, the state's attorney, asked defendant certain questions relative to his having a venereal disease, and among other questions he asked him what was the matter with him, to which defendant replied: "There is Dr. Todd who treated me. He can tell you." Thereupon Dr. Todd said in effect that defendant had a loathsome disease, naming it. The defense contends that it was improper to permit the doctor to narrate this conversation, for two reasons: First, because it violated section 7304, Rev. Codes 1905, which provides that a physician or surgeon cannot be examined as a witness without the consent of the patient as to any information acquired in attending the patient; and second, because such conversation could not be construed as either an express or implied admission on defendant's part of the fact sought to be proved. Such objection held untenable. *State v. Werner*, 83.

STATUTES—Continued.

11. A mandamus proceeding is not an action under sections 6741, 6742, and 6743, Rev. Codes 1905, being a special proceeding. Under section 7229, Rev. Codes 1905, only actions are triable de novo in the Supreme Court, and this does not contemplate the trial de novo of special proceedings. *State v. Fabrick*, 94.
12. The absence of a verification from the assessment roll is a defense to the proceeding for the collection of a tax under the provisions of chapter 161, p. 213, Laws 1903. *Grand Forks County v. Frederick*, 118.
13. The provisions of chapter 166, p. 232, Laws 1903, which legalizes only irregularities in assessing or levying taxes upon real estate, do not apply to void assessments by reason of failure to describe the land definitely. *Grand Forks County v. Frederick*, 118.
14. Questions certified to the Supreme Court by the district court for review, pursuant to section 10 of chapter 161, p. 218, Laws 1903, should be based upon a statement of the facts established on the trial, and the evidence should not be returned to this court. *Grand Forks County v. Frederick*, 118.
15. A justice of the peace acquires jurisdiction to try and determine an action for forcible detainer under section 8406, Rev. Codes 1905, by the giving of a notice to quit although such notice is not filed with the justice when the summons is issued. *McClain v. Nurnberg*, 144.
16. Application is made to this court by a private relator for the issuance of a writ in the nature of quo warrant directing the defendants, who are acting as county officials of McKenzie county, to desist from exercising jurisdiction and authority over the territory included in such county, basing such application upon the ground of the unconstitutionality of chapter 73, p. 155, of the Laws of 1905. The application is resisted by the defendants and also by the Attorney General. Held, that such writs will only be issued by this court as prerogative writs, and will not be issued at the request of a private relator, except in very exceptional cases. *State v. Nohle*, 168.
17. Equity will remove a cloud upon the title caused by the record of a mechanic's lien which has become forfeited by the lien claimant's failure to institute foreclosure proceedings upon demand, under section 4797, Rev. Codes 1899, (sec. 6246, Rev. Codes 1905) *Sheets v. Prosser*, 180.
18. Under the seed lien statute of this state (sections 6271, 6272, Rev. Codes 1905), a person who in good faith furnishes seed grain to another is entitled to a lien for the entire purchase price of such seed upon the crop produced therefrom, whether all of such seed is sown or not. *Schlosser v. Moores*, 185.
19. A deed is not void or champertous, under section 8733, Rev. Codes 1905, where an attorney for the grantee examines the records before the deed is given and discovers defects in tax deeds of record on which title is claimed. *State Finance Co. v. Bowdle*, 193.
20. The fact that portions of a blank certificate of sale of land for taxes, under chapter 67, p. 76, Laws 1897, which apply to a sale under different conditions, are not erased before delivery, does not render such certificate void on its face. *State Finance Co. v. Trimble*, 199.

STATUTES—Continued.

21. Section 7021, Rev. Codes 1905, requiring the court to charge the jury in writing, is mandatory, and is intended to give the court opportunity to consider such request before instructing the jury. *Carr v. Soo Ry.*, 217.
22. Conviction, under section 9077, Rev. Codes 1905, is not a necessary prerequisite to the maintenance of an action for damages for breach of warranty of horses against the disease known as "glanders". *Larson v. Calder*, 248.
23. Under section 7592, Rev. Codes 1905, the complaint in such action need not allege the public necessity for the crossing sought to be opened. *Grafton v. Railway Co.*, 313.
24. The defendants appealed from a judgment of a justice of the peace to the district court, and furnished only an undertaking in conformity with section 8503, Rev. Codes 1905, relating to appeals from justice's court. Held, that the words "all costs" contained in the undertaking in accordance with the requirements of section 8503 are sufficiently comprehensive to cover costs on appeal, and that the district court acquired jurisdiction without filing the bond mentioned in section 8502, Rev. Codes 1905. *Johnson v. Glaspey*, 335.
25. Under the provisions of section 8428, Rev. Codes 1905, which is to the effect that, if the jurors are discharged without rendering a verdict, "* * *" the court shall proceed again to trial as in the first instance, until a verdict is rendered," where the jury returned what was in form a verdict, but which failed to find on all the material issues, the justice was warranted in holding that it was not a lawful verdict, and in setting the case for retrial. *Johnson v. Glaspey*, 335.
26. The constitutionality of chapter 189, p. 307, of the Laws of 1907, of this state, requiring the registration and publication of internal revenue tax receipts is assailed upon the grounds: (1.) That it is obnoxious to the provision of the United States Constitution (article 6, section 2) which declares that the constitution and the laws of the United States shall be made in pursuance thereof shall be the supreme law of the land; and that the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. (2.) That it infringes section 13 of the state constitution, which guarantees immunity from self-crimination. *State v. Hanson*, 347.
27. The provisions of chapter 101, p. 129, Laws 1901, giving a lien to materialmen and laborers upon buildings erected upon land occupied by persons pursuant to the land laws of the United States, is germane to the title to said law, being "an act regulating the filing and foreclosure of mechanic's liens upon lands held or occupied under a filing under any of the land laws of the United States," and does not contravene the provisions of section 61, article 2, constitution, providing that the subject of an act shall be expressed in its title. *Powers Elevator Co. v. Pottner*, 359.
28. The primary election established by chapter 109, p. 207, Laws 1905 (section 555, Rev. Codes 1905,) is an election within the meaning of section 121 of the constitution, which prescribes the qualifications for voters at "any election." *Johnson v. Grand Forks County*, 363.
29. The provision exacting fees for printing the names of candidates on the official primary election ballot required by section 4 (Laws 1905, p. 208, c. 109), of the law above referred to is unconstitutional, as being a qualification of voters and candidates not included in the constitutional requirements, and is an arbitrary, unwarranted, un-

STATUTES—Continued.

- reasonable, and unnecessary regulation of elections, having no tendency to promote honesty, fairness, or good order in the conduct of elections. *Johnson v. Grand Forks County*, 363.
30. In an action by wholesale liquor dealers located in Minnesota to recover the purchase price of intoxicating liquors sold to persons residing in this state, the answer, in addition to a general denial, alleged that such sales were made in North Dakota, and therefore void under the provisions of section 7621, Rev. Codes 1899. Held, that such sales took place in Minnesota, the liquors having been delivered f. o. b. cars at St. Paul, pursuant to orders sent to plaintiffs at that place. *Frankel v. Hillier*, 387.
 31. Under the provisions of section 9390, Rev. Codes 1905, mere knowledge by the vendor of intoxicating liquors lawfully sold in one state that the vendee intends to resell them in violation of the law of another state, is not sufficient to defeat an action brought in the latter state by the vendor against the vendee to recover the purchase price thereof. In order to defeat such action for the purchase price it must appear that the vendor intended by such sale, in some manner no matter how slight, to aid the vendee in his unlawful design to violate the laws of this state. *Frankel v. Hillier*, 387.
 32. Plaintiff agreed to sell to defendant, and defendant agreed to purchase from plaintiff, a certain threshing rig, and, upon defendant's refusal to accept and settle for such property, plaintiff proceeded to enforce a vendor's lien for the purchase price pursuant to section 6284, Rev. Codes 1905. Plaintiff, without defendant's consent, bid such property in at the foreclosure sale. Held, that the statutory manner of foreclosing such liens being the same as that prescribed for the foreclosure of liens on pledged property, plaintiff had no right in the absence of defendant's consent, to purchase the property at the sale, and such sale was therefore voidable at defendant's election. *Reeves & Co. v. Bruening*, 398.
 33. The enactment of section 6296, Rev. Codes 1905, which provides generally that liens upon personal property may be foreclosed upon the notice and in the manner provided for the foreclosure of mortgages upon personal property, did not operate to repeal the special provision relating to the foreclosure of pledged property as contained in chapter 76 of the Civil Code (Rev. Codes 1905, sections 6193-6218). *Reeves & Co. v. Bruening*, 398.
 34. Defendant not having consented to, nor ratified, such purchase by plaintiff, the sale was ineffectual to transfer the title to the property to plaintiff. Hence no recovery can be had in this action under the rule of damages prescribed in subdivision 1, section 6573, Rev. Codes 1905, and the district court therefore erred in rendering judgment for plaintiff. *Reeves & Co. v. Bruening*, 398.
 35. An appeal to the district court from a judgment of a justice of the peace having been duly taken and perfected by the service of a notice of appeal and undertaking, pursuant to Rev. Codes 1905, sections 8500, 8507, it was error to dismiss the same upon the ground that the justice had failed to transmit to the clerk his transcript as required by the latter section. *Haessly v. Thate*, 403.
 36. Upon the trial of a person charged with murder, and in which one of the defenses relied on is justifiable homicide, or self defense it is prejudicial error to instruct the jury that the burden of proof is upon the defendant to establish such defense by a preponderance of the evidence. The burden never shifts to the defendant to establish

STATUTES—Continued.

- by a preponderance of the evidence either facts and circumstances in mitigation or excuse, or facts establishing an affirmative defense. But under section 10,023, Rev. Codes 1905, where the commission of such homicide has been established by the state, the burden is upon defendant of proving circumstances of mitigation, excuse, or justification, unless the state's proof tends to show that such crime only amounts to manslaughter, or that defendant's act was justifiable or excusable. But this does not mean that defendant is required to do more than show circumstances creating a reasonable doubt as to such matters. *State v. Hazlet*, 426.
37. Applying well-established rules, it is held, that the relator, who is county treasurer of Grand Forks county, is not entitled to invoke the jurisdiction of this court to issue the writ of mandamus to compel the state auditor to issue and deliver to the state treasurer a warrant pursuant to the provisions of chapter 139, p. 185, Laws 1903, being section 9395, Rev. Codes 1905. *State v. Holmes*, 457.
 38. Petitioner was adjudged guilty of contempt of court for wilfully violating an order excluding him from visiting the grand jury room while the grand jury were in session. He seeks to justify his action upon the grounds: (1.) That he was a duly appointed and qualified assistant state's attorney of the county. (2.) That he was employed by the board of county commissioners to assist the state's attorney in the discharge of certain duties; and (3.) That he was a duly appointed and qualified deputy enforcement commissioner of the state under the provisions of chapter 187, p. 303, of the Laws of 1907. Held for reasons stated in the opinion, that neither his appointment as assistant state's attorney nor his employment by the board of county commissioners vested in him any right to visit such grand jury sessions. Held, also, that no such right could be claimed under his appointment as deputy enforcement commissioner for the reason that the law creating such alleged office is unconstitutional and void for the reasons set forth at length in the opinion. *Ex Parte Corliss*, 470.
 39. A compulsory reference of an issue under the provisions of section 7047, Rev. Code 1905, is not permissible unless it appears that the trial of such issue will necessitate the examination of a long account between the parties. It is not sufficient that it appears that the trial may involve the examination of a long account; but it must affirmatively appear that it will do so. *Dreveskracht v. Bank*, 555.
 40. Resurvey of lands must be in accordance with the laws of the United States and the instructions issued by the officers thereof in charge of the government surveys. Rev. Codes 1905, Sec. 2540. *Nystrom v. Lee*, 561.
 41. The title to chapter 161, p. 255, Laws 1907, being an act "defining the boundaries of the Second, Eighth and Ninth judicial districts of the state of North Dakota and providing for terms of court in said district," does not contravene the provisions of section 61, art. 2, of the constitution, requiring that the subject of the act shall be expressed in the title, although the act provides that the judge for the Ninth district shall be elected at the general election of 1908, and that until such election the territory comprising said district shall be and remain a part of the judicial district to which it belongs under existing laws. *State v. Burr*, 581.
 42. Special damages on conversion of property are allowed, under section 6587, subd. 3, Rev. Codes 1905, only when properly incurred in pursuit of the property. *Aronson v. Opegard*, 595.
 43. Under certain circumstances, the vendee in a contract is deemed the owner of the land within the meaning of section 6248, Rev. Codes 1905. *Salzer Lbr. Co. v. Clafin*, 601.

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STATUTORY CONSTRUCTION. SEE OFFICERS, 569.

1. Section 7021, Rev. Codes 1905, requiring the court to charge the jury in writing is mandatory. *Carr v. Soo Ry.*, 217.
2. In construing a statute the courts will, if possible, give effect to the manifest intent of the legislature as disclosed by the provisions of the whole act although in so doing it becomes necessary to disregard the strict letter of the law in some of its provisions. *State v. Hanson*, 347.
3. The rule of statutory construction that repeals by implication are not favored, and that special provisions of a statute are not repealed by general provisions relating to the same subject matter unless the legislative intent to that effect is manifest, is stated and applied in the opinion. *Reeves & Co. v. Bruening*, 398.
4. In construing statutes, the great aim of courts should be to give effect to the intent of the legislature in the enactment of each provision of the law. *State v. Burr*, 581.
5. In ascertaining what the legislative intent is, inharmonious and contradictory sections should be harmonized and made effectual if it can be done under reasonable rules of construction, and no section or utterance should be nullified if it can be given effect by such rules. *State v. Burr*, 581.
6. In determining what the legislative intent was in passing a law that is ambiguous in its terms, the journals of the legislature may be read in order to correctly ascertain such intention. *State v. Burr*, 581.
7. In determining what the legislative intention was in passing a law whose provisions are contradictory on its face, the fact that the journal shows that a positive provision, contradictory of a provision stricken out, was inserted in the act by an amendment adopted as the last act before it passed by one body, will be accepted as controlling of the intent, and the seemingly contradictory provisions left in the act will be disregarded and deemed to be in the law through inadvertence. *State v. Burr*, 581.
8. The mechanic's lien law is remedial, and should be liberally construed to effectuate its purposes. *Salzer Lbr. Co. v. Claflin*, 601.

STATUTORY PENALTY.

1. In an action to recover a statutory penalty, the complaint must clearly indicate the statute by virtue of which the penalty is claimed. *Sheets v. Prosser*, 180.
2. In an action to recover the penalty imposed by section 4799, Rev. Codes 1899, for failure to discharge mechanic's lien of record, the complaint must state that the release which the lien claimant was notified to execute could have been executed by him without expense. *Sheets v. Prosser*, 180.

STIPULATION. SEE APPEAL AND ERROR, 138.

- 1 The Supreme Court is not bound by stipulation of the parties of record to an action wherein it is agreed that the trial court committed error in appellant's brief, and requesting this court to reverse the judgment of the lower court and enter judgment in favor of the appellants, and will not, under the circumstances disclosed by the record and stipulation in this case, comply with the terms of such a stipulation, especially when the record discloses no reversible error on the part of the trial court, and interested third parties, with the knowledge of both plaintiff and defendant, have participated in and contributed toward the conduct of the litigation from its inception. *Gordon v. Goldamer*, 323.

STREETS. SEE MUNICIPAL CORPORATIONS, 313.

SUPREME COURT. SEE CRIMINAL LAW, 1; APPEAL AND ERROR, 83, 138, 144; STIPULATION, 323.

1. The Supreme Court has no jurisdiction in a divorce case pending in the district court to entertain a motion for counsel fees to prepare an appeal from an order of the district court made therein for an allowance to the wife, and counsel fees in the main case. *Tonn v. Tonn*, 17.
2. A mandamus proceeding is not an action under sections 6741, 6742 and 6743, Rev. Codes 1905, being a special proceeding. Under section 7229, Rev. Codes 1905, only actions are triable de novo in the Supreme Court, and this does not contemplate the trial de novo of special proceedings. *State v. Fabrick*, 94.
3. Questions certified to the Supreme Court by the District Court for review, pursuant to section 10 of said chapter 161, p. 218, laws 1903, should be based upon a statement of the facts established on the trial, and the evidence should not be returned to this court. *Grand Forks County v. Frederick* 118.
4. The writ of quo warranto will only be issued by this court as a prerogative writ and not at the request of a private relator, except in very exceptional cases. *State v. Nohle*, 168.
5. The issuance of writs of quo warranto by the Supreme Court is wholly discretionary and will be denied upon grounds of public policy, where the issuance would result in no perceivable benefit to the relator or others, but would result in great detriment to a large number of people and would lead to much strife, confusion and litigation. *State v. Nohle*, 168.
6. Errors in giving instructions must be affirmatively shown by the abstract, and the court will not explore the record to substantiate assignments of error. *Kelly v. Pierce*, 234.

SUPREME COURT—Continued.

7. The Supreme Court has the power, under section 7229, Rev. Codes 1905, to determine all the issues between the parties involved in an action appealed under said section. *Mosher v. Mosher*, 269.
8. The Supreme Court has jurisdiction to consider applications for temporary alimony, counsel fees and suit money, after the District Court has lost jurisdiction; but such applications will not be considered as a matter of course, and should be made in the District Court whenever there is reasonable opportunity to present them intelligently to the court before appeal. *Mosher v. Mosher*, 269.
9. The Supreme Court will not reverse the trial court on account of receiving evidence out of its proper order, except in a clear case of abuse of discretion. *Madson v. Rutten*, 281.
10. It is too late for defendants to first object in the Supreme Court to their non-joinders as plaintiffs. *Gordon v. Goldamer*, 323.
11. The Supreme Court is not bound by stipulation of the parties of record to an action wherein it is agreed that the trial court committed error in appellant's brief, and requesting this court to reverse the judgment of the lower court and enter judgment in favor of the appellants, and will not, under the circumstances disclosed by the record, and stipulation in this case comply with the terms of such a stipulation, especially when the record discloses no reversible error on the part of the trial court, and interested third parties with the knowledge of both plaintiff and defendant, have participated in and contributed toward the conduct of the litigation from its inception. *Gordon v. Goldamer*, 323.
12. The Supreme Court's jurisdiction under the constitution to issue original writs (except those writs necessary to the proper exercise of its appellate jurisdiction and to aid in its supervisory control over inferior courts) extends only to prerogative writs, viz: in cases *publici juris* wherein are directly involved the sovereignty of the state, its franchises and prerogatives, or the liberty of the citizen. *State v. Holmes*, 457.
13. Whether the court will exercise its extraordinary jurisdiction in cases coming within the above rule is a matter within its sound judicial discretion, depending on the particular facts in each case; but in cases not within said rule, no discretion is vested in this court. *State v. Holmes*, 457.
14. Applying the above well-established rule, it is held that the relator, who is county treasurer of Grand Forks county, is not entitled to invoke the jurisdiction of this court to issue the writ of mandamus to compel the state auditor to issue and deliver to the state treasurer a warrant pursuant to the provisions of chapter 139, p. 185, laws 1903, being section 9395, Rev. Codes 1905. *State v. Holmes*, 457.
15. Where the governor of the state appoints a judge of the district court, under a law providing that the office shall be filled by a general election, and a private relator applies for leave to file an application for a writ in the nature of a writ of quo warranto, on the ground that he has suits pending of a strictly personal nature, and that the public are interested and that the sovereignty of the state is affected, the Supreme Court will assume original jurisdiction under section 87, art. 4, of the constitution, although the attorney general refuses to consent that said private relator may apply for leave to file the application for such writ in the name of the state. *State v. Burr*, 581.

SURVEYS.

1. Resurvey of lands must be in accordance with the laws of the United States and the instructions issued by the officers thereof, in charge of the government land surveys. *Rev. Codes 1905, Sec. 2540, Nystrom v. Lee, 561.*
2. The official instructions to United States surveyors for locating and relocating quarter section corners on interior sections, require them to be established equidistant from section corners. Hence, in absence of other evidence, when one corner and the quarter corner are found, the lost section corner will be presumed to have been located the same distance from the quarter corner as the latter is found to be from the existing corner. *Nystrom v. Lee, 561.*
3. When the northwest, northeast, and southwest corners of an interior section and the west and north quarter corners are found or established, and a point on a line run one mile due south from the northeast corner of the section is found to be just one mile east of the southwest corner, such point, in the absence of conflicting evidence, will be presumed to be the original southeast section corner, and the points midway between that point and the established corners the south and east quarter corners. *Nystrom v. Lee, 561.*

TAXATION.

1. A description of land in an assessment roll must be so definite as to afford the owner the means of identification of the land, and inform intending purchasers what land is offered for sale. *Grand Forks Co. v. Frederick, 118.*
2. The fact that the owner is not misled and is aware that it is his lot or land that is intended to be assessed, and that he owns no other real estate in the block, is immaterial, and does not have the effect of validating a void assessment. *Grand Forks Co. v. Frederick, 118.*
3. The absence of a verification from the assessment roll is a defense to the proceedings for the collection of a tax under the provisions of chapter 161, page 213, Laws 1903. *Grand Forks Co. v. Frederick, 118.*
4. The provisions of chapter 166, p. 232, Laws 1903, which legalizes only irregularities in assessing or levying taxes upon real estate, do not apply to void assessments by reason of failure to describe the land definitely. *Grand Forks Co. v. Frederick, 118.*
5. A description in an assessment roll of a part of a lot as the "N. 23x200 feet," the said lot being about 600 feet long and extending in a northeasterly direction, is void for indefiniteness, although the owner of the lot is correctly named in the assessment roll. *Grand Forks Co. v. Frederick, 118.*
6. An assessment of one tract of land, comprising two smaller tracts owned by different persons whose titles are of record, is a nullity. *State Finance Co. v. Bowdle, 193.*
7. Each tract of land owned by different parties whose titles are of record must be separately assessed. *State Finance Co. v. Bowdle, 193.*
8. Where a tract of land, comprised of smaller tracts owned by different parties whose titles are of record, is assessed in a body in

TAXATION—Continued.

- the name of one of the separate owners only, the assessment is inherently defective, and no tender of the taxes justly due is essential to the maintenance of an action to quiet title. *State Finance Co. v. Bowdle*, 193.
9. A deed is not void or champertous, under section 8733, Rev. Codes 1905, where an attorney for the grantee examines the records before the deed is given and discovers defects in tax deed of record on which title is claimed. *State Finance Co. v. Bowdle*, 193.
 10. A clause in a quit claim deed to the effect that the grantor makes no representations as to his title is not a disclaimer of title, nor does it show a prior abandonment of the land. *State Finance Co. v. Bowdle*, 193.
 11. Section 96, chapter 126, p. 292, laws 1897, and section 92, chapter 132, p. 376 laws 1890 do not apply to division of valuations, where no transfer of the land has been made after assessment of taxes. *State Finance Co. v. Bowdle*, 193.
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 13. The fact that portions of a blank certificate of sale of land for taxes under chapter 67, p. 76, Laws 1897, which apply to a sale under different conditions, are not erased before delivery, does not render such certificate void on its face. *State Finance Co. v. Trimble*, 199.
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 16. A court of equity will not require the payment of taxes as a condition of relief from a deed, where there has been no assessment for want of a sufficient description. *State Finance Co. v. Trimble*, 199.
 17. Where there has been a valid assessment and levy, and there exists no other jurisdictional defects, equity will require payment of the tax before relief will be decreed. *State Finance Co. v. Trimble*, 199.
 18. Notice of the expiration of time for a redemption under a sale under the "Woods Law" is insufficient, when it erroneously describes the land and does not clearly apprise the owner that his land has been sold and that the time for redemption is about to expire. *State Finance Co. v. Trimble*, 199.
 19. Various descriptions of land in assessment rolls and notices considered, and their sufficiency passed upon. *State Finance Co. v. Trimble*, 199.
 20. A certificate of sale of land for the taxes of 1895, which is void for irregularity in the description of land is not any evidence of assessment and levy of a tax. *State Finance Co. v. Mulberger*, 214.
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TAXATION—Continued.

22. Notices of tax sales and notices of the time when redemption will expire must describe the land involved in the tax, and such notices are not effectual without such description. *State Finance Co. v. Mulberger*, 214.
23. A tax deed issued in 1898 in the name of a county, and not in the name of the state, is void. *State Finance Company v. Mulberger*, 214.
24. Service of notice of time when the period of redemption from a tax sale will expire on the holder of a void tax deed as owner is not effectual for any purpose. *State Finance Co. v. Mulberger* 214.
25. Various descriptions of land in assessments, notices of sale and notices of expiration of redemption period considered, and their sufficiency passed upon. *State Finance Co. v. Mulberger*, 214.
26. The exercise by congress of the power to tax a business or occupation delegated to it by the federal constitution, and the prescribing of regulations to aid the government in collecting such tax; in no manner curtail or interfere with the exercise by the respective states of their undoubted right under the police power to regulate or entirely prohibit the business or occupation thus taxed, because in its judgment such business or occupation is deemed injurious to the public morals, the public health or the public safety. The power of the state to protect its citizens from the evils of intemperance, to enact or enforce any legislation not in conflict with the federal or state constitution, which it deems advisable or necessary for the safeguarding of the public morals and the preservation of the public health, is not only an attribute of sovereignty, but a power inherent in statehood. In all matters relating to the life, liberty and property of the citizen, the state is sovereign, so long as it does not conflict with the federal constitution. *State v. Hanson*, 347.

TAX CERTIFICATE. SEE TAXATION, 199, 214.

TAX DEED. SEE TAXATION, 199, 214.

TENDER.

1. A sale of personal property followed by actual delivery cannot be rescinded, unless the property be promptly returned to the seller, or its return tendered and refused, or its return waived. *Owens v. Doughty*, 10.
2. A contract or sale of personal property cannot be generally rescinded by a return or offer to return only that part of the property unsold. *Owens v. Doughty*, 10.
3. Payment of the debt secured by a mechanic's lien will not be required as a condition to relief in an action to quiet title against it where the holder refuses to foreclose upon demand under section 6246, Rev. Codes., 1905, *Sheets v. Prosser*, 180.
4. A court of equity will not require the payment of taxes as a condition of relief from a deed, where there has been no assessment for want of a sufficient description of the land. *State Finance Co. v. Trimble*, 199.

TENDER—Continued.

5. Where there has been a valid assessment and levy, and there exists no other jurisdictional defects, equity will require payment of the tax before relief will be decreed. *State Finance Co. v. Trimble*, 199.
6. In an action by a vendor to have a deed, absolute in form, adjudged a mortgage, and asking for an accounting and right to redeem, the amount of indebtedness and right to redeem being in dispute, it is unnecessary for a plaintiff to allege or prove a tender to defendant of any sum prior to the commencement of the action; it being sufficient for plaintiff to allege and prove a willingness to redeem by paying such sum as may be adjudged to be due and owing by him to defendant. *Smith v. Jensen*, 408.

TRANSACTIONS WITH DECEDENT. SEE WITNESS, 126.

TRANSFERS. SEE CORPORATIONS, 546.

TRESPASS. SEE CRIMINAL LAW, 420.

TRIAL. SEE APPEAL AND ERROR, 231; CRIMINAL LAW, 420;
FINDINGS OF FACT, 546.

1. In a judgment notwithstanding the verdict will not be granted in every case where a directed verdict is erroneously denied. It is only when there is no reasonable probability that the defects in proof or pleading necessary to sustain the verdict can be remedied on another trial that such judgment will be ordered. *Kerr v. Anderson*, 36:.
2. The ruling of the trial court in permitting plaintiff to introduce evidence as to the contents of Exhibit C, being a contract between plaintiff as agent and the purchasers, was error without prejudice. *Kepner v. Ford*, 50.
3. Upon cross-examination of plaintiff, it was disclosed that one Chamberlain is to receive 25 per cent of any sum plaintiff may recover in this action, and defendant contends that such should defeat plaintiff's recovery. The answer to this contention is the fact that no such defense was pleaded in the answer, and furthermore, no ruling was made; nor was the trial court asked to make any ruling upon which such assignment of error could be predicated. *Kepner v. Ford*, 50.
4. When there is a substantial conflict in the testimony, it is reversible error to direct a verdict. Such action by the court is a clear invasion of the province of the jury, as the jury, and not the court, must determine the credibility of the witnesses. *Zink v. Lahart*, 56.
5. Certain admonitions by the trial judge to the defendant, while on the witness stand, but not in the presence or hearing of the jury, were not prejudicial to the rights of defendant. *Zink v. Lahart*, 56.
6. Evidence examined and held to be sufficient, under the rule heretofore established, by this court, to require a submission to the jury of the question of the defendant's negligence as alleged in the complaint. *Hall v. N. P. Ry. Co.*, 60.
7. It was properly a question for the jury to say under all the evidence whether or not plaintiff was guilty of negligence contributing to the injury complained of. *Hall v. N. P. Ry. Co.*, 60.

TRIAL—Continued.

8. The state called Dr. Vidal in rebuttal, and proved by him, over defendant's objection that the same was not proper rebuttal evidence, certain facts relative to the physical condition of the prosecutrix, and also elicited from him as a medical expert an opinion conflicting with the opinions given by defendant's witnesses based upon the condition of the child at the date of the trial. Held not error. *State v. Werner*, 83.
9. There was a substantial conflict in the evidence as to whether the original government monument marking the south end of the quarter section line between the lands of plaintiff and defendant was established at the point contended for by plaintiff or at the point contended for by defendant, and hence it was error to direct a verdict. *Propper v. Wohlwend*, 110.
10. Where a trial court grants leave to amend a complaint and to file the former amended complaint at a later time, and the trial proceeds on the theory that the complaint has been regularly amended, and no objection is made to the irregularity until the case reaches the Supreme Court on appeal, the irregularity is waived. *McClain v. Nurnberg*, 144.
11. A requested instruction is properly refused, unless it is applicable to the facts as proven or to some theory of the evidence given in the case. *McClain v. Nurnberg*, 144.
12. Whether or not such a contract as the one stated in the complaint was in fact entered into, was, under the evidence, a question for the jury and it was therefore error to direct a verdict in plaintiff's favor. *Anderson v. Johnson*, 174.
13. Contributory negligence as well as negligence of the defendant, are questions for the jury in a case at law, unless the conceded facts from which the inference must be drawn admit of only one conclusion. *Carr v. Soo Ry. Co.*, 217.
14. If the facts relating to contributory negligence or to negligence of the defendant are such that different impartial minds might fairly draw different conclusions from them, they should be submitted to the jury, and are only for the court when such fair-minded men might draw only one conclusion from them. *Carr v. Soo Ry. Co.*, 217.
15. In an action for negligence of a railroad company in killing and injuring cattle on defendant's right of way by train, plaintiffs rested after proving the killing, injury, and value; but on cross-examination of plaintiffs' witnesses, by whom such proof had been made, it had been shown that plaintiffs' buildings were one mile from the railway track; that the cattle in question were confined at the buildings during the night, but in the day time were driven south of the buildings and turned onto the grass land according to custom; that they had never before the day in question been known to stray upon the defendant's right of way, but on the day of the accident they went upon the defendant's right of way, without the knowledge of the plaintiffs, and some were killed and others injured by one of defendant's trains. Held, that the question of plaintiffs' negligence in turning their cattle out under the circumstances was for the jury. *Carr v. Soo Ry. Co.*, 217.
16. In such a case, where there is a conflict in the evidence as to the time of day when the accident occurred, and as to whether the day was foggy or clear, and as to whether the train regarding which the defendant's witnesses testified was the one which did the dam-

TRIAL—Continued.

- age and as to other facts, it being conceded by defendant's witnesses that they did not stop the train which they were running, and which killed cattle on that day, and took no precaution to avoid injury after they discovered the cattle. Held, that the question of negligence on the part of the defendant was properly submitted to the jury, and the defendant's motion for a directed verdict was properly overruled. *Carr v. Soo Ry. Co.*, 217.
17. It is not error to refuse instructions not submitted in writing. *Carr v. Soo Ry. Co.*, 217.
 18. Section 7021, Rev. Codes 1905, requiring the court to charge the jury in writing is mandatory. *Carr v. Soo Ry. Co.*, 217.
 19. If the defendant desired more explicit instructions than were given by the court, they should have been presented to the court in writing, with request that they be given. *Carr v. Soo Ry. Co.*, 217.
 20. Respondent purchased two horses of appellant, who represented a discharge from their nostrils as being caused by a cold caught in swimming the Missouri and stated that they were sound, and would be all right in a day or two, in answer to respondent's inquiry as to the cause of the discharge. Held, that if there was doubt as to this representation being a warranty, it was a proper question for submission to the jury. *Larson v. Calder*, 248.
 21. When the facts relating to the negligence or contributory negligence are not in dispute, and but one inference can reasonably be deduced therefrom, the question of negligence or contributory negligence becomes a question of law for the court. *Morrison v. Lee*, 377.
 22. The question as to whether the defendants were co-partners as alleged in the complaint is a mixed question of law and fact, and under the evidence the court could not determine such question as a matter of law. *Frankel v. Hillier*, 387.
 23. It is not error to deny motion for a directed verdict or for a judgment, notwithstanding the verdict, when the evidence shows a conflict as to whether the cause of action pleaded has been proven. *Higgs v. Soo Ry. Co.*, 446.
 24. A compulsory reference of an issue under the provisions of section 7047, Rev. Codes 1905, is not permissible unless it appears that the trial of such issue will necessitate the examination of a long account between the parties. It is not sufficient that it appears that the trial may involve the examination of a long account; but it must affirmatively appear that it will do so. *Dreveskracht v. Bank*, 555.

TROVER AND CONVERSION.

1. In an action by a landlord for the conversion of grain raised by his tenant under a written lease providing that the title to the grain shall be in the landlord until a division thereof, and that he can hold it until paid for all advances to the tenant under the lease; and before division the tenant mortgages his undivided one-half to a third person and the mortgagee takes the grain and sells it under his mortgage, through an agent; upon the latter's intervention he is not entitled to trial by the court where no equitable issues were presented by the pleadings. *Aronson v. Oppegard*, 595.
2. Special damages on conversion of property are allowed, under section 6585, subd. 3 Rev. Codes 1905, only when properly incurred in pursuit of the property. *Aronson v. Oppegard*, 595.

VENDOR AND PURCHASER. SEE DEEDS, 408; STATUTE OF FRAUDS, 551.

1. Evidence held to justify the findings of the trial court. *Connolly v. Lueros*, 16.
2. In an action to compel specific performance of a contract for the purchase of real property, the vendee defended upon the ground among others, that the vendor could not transfer to him a title free from reasonable doubt in conformity to Rev. Codes 1899, section 5032. Held, that such defense was not established. *Woodward v. McCollum*, 42.
3. The vendee was bound to point out the defects complained of in the vendor's title, and by pointing out specific defects he waived those, if any, not mentioned by him. *Woodward v. McCollum*, 42.
4. Plaintiff's delay in furnishing title to defendant was not under the circumstances detailed in the opinion sufficient to relieve the defendant of his contract duty to accept and pay for the property. Time was not made the essence of the contract, and, further, such delay was waived by defendant. *Woodward v. McCollum*, 42.
5. A barn on the premises was destroyed by fire after the contract for the deed was executed without the fault of either party, and it is held that this fact does not prevent specific performance of the contract, as the loss must be borne by the vendee; he being the beneficial owner in equity of the property. *Woodward v. McCollum*, 42.
6. The fact that a portion of the land embraced in the contract consisted of the homestead of the defendant and his wife, and that the latter did not join in the execution of the contract, does not render such contract invalid as it was not a contract for the sale of the property, but a mere agreement on defendant's part to compensate plaintiff for finding a purchaser. *Kepner v. Ford*, 50.
7. A vendee who refuses to perform his agreement to execute notes for the purchase price of personal property sold and delivered to him, may be sued by the vendor for damages for breach of the contract immediately upon the refusal to deliver the notes, and the measure of damages will be the contract price. *Kelly v. Pierce*, 234.
8. Plaintiffs, who are husband and wife, brought this action claiming an equitable estate in certain real property under a contract for the purchase thereof entered into by the husband with one of the defendant's, and also claiming a homestead right in 160 acres of land, and prayed judgment giving them a right to redeem upon paying the amount due under the contract and certain other sums as security, for the payment of which the husband had assigned to one of the defendants the contract aforesaid. Evidence examined, and held, for reasons stated in the opinion, that the relief prayed for must be denied. *Ferris v. Jensen*, 462.
9. Plaintiffs occupied the land and farmed the same for several years, but failed to comply with the contract in any material respect, and, having become helplessly in debt and unable to perform his part part of the contract, the husband early in 1903 without his wife joining with him, negotiated a sale of his equity therein to defendant Jensen, and sold and disposed of all his personal property and shortly thereafter yielded possession of the premises to Jensen, both plaintiffs voluntarily removing from the land. Held, following the rule announced in *Helgeby v. Dammen*, 13 N. D. 167, 100

VENDOR AND PURCHASER—Continued.

- N. W. 245, that such facts constituted an abandonment of the contract and of their homestead rights in the land. *Ferris v. Jensen*, 462.
10. A wife's homestead rights in land of which her husband has merely an equitable title under an executory contract for the purchase thereof are no greater than, and are dependent upon, the rights of her husband under the contract. If the husband's equitable estate become forfeited or otherwise extinguished, the homestead right is also extinguished. *Ferris v. Jensen*, 462.
 11. The trial court denied the relief asked for, but took an account between plaintiff, Geo. W. Ferris, and defendant, Jensen, and rendered a money judgment against said defendant and in said plaintiff's favor, basing such action upon the theory of a sale to said defendant of such equitable estate. Whether an accounting was proper under the issues is not determined; the evidence showing that no cause of action was proved, even under such theory. *Ferris v. Jensen*, 462.
 12. A materialman furnishing lumber to an occupant, as vendee under a contract for the purchase of land under the crop payment plan, to be used in the erection of a building thereon, is entitled to a lien on such building, and the vendee's interest in the land. *Salzer Lbr. Co. v. Claflin*, 601.
 13. Under such circumstances, the vendee in the contract is deemed the owner of the land within the meaning of section 6248, Rev. Codes 1905. *Salzer Lbr. Co. v. Claflin*, 601.
 14. Under such circumstances, the vendee of the land is the equitable owner of the land, and the vendor holds the legal title to the land in trust for the purchaser and as security for the payment of the purchase price. *Salzer Lbr. Co. v. Claflin*, 601.
 15. The fact that the vendor terminated the contract after an action to foreclose the lien had been commenced under an arrangement with the vendee does not affect the lien, as the right to such lien must be determined as of the date of furnishing the materials. *Salzer Lbr. Co. v. Claflin*, 601.

VENUE.

1. The prima facie presumption that an affidavit is sworn to in the county named in its caption or venue is overcome by the presumption that an officer's acts are performed at the county where he is legally authorized to act. *Salzer Lbr. Co. v. Claflin*, 601.

VERDICT. SEE APPEAL AND ERROR, 231.

1. A judgment, notwithstanding the verdict will not be granted in every case where a directed verdict is erroneously denied. It is only when there is no reasonable probability that the defects in proof or pleading necessary to sustain the verdict can be remedied on another trial that such judgment will be ordered. *Kerr v. Anderson*, 36.
2. When there is a substantial conflict in the testimony it is reversible error to direct a verdict. *Zink v. Lahart*, 56.
3. Both parties moved for a directed verdict and defendant's motion was granted. Subsequently plaintiff's motion for judgment notwithstanding the verdict was granted; later this motion was refused

VERDICT—Continued.

- and a similar one for plaintiff granted. Held, that the court had jurisdiction to do this and no error was committed. *Sim v. Rosholt*, 77.
4. Upon trial for rape where the prosecutrix is a child eight years of age, and it is claimed that upon medical examination the condition of the child was such that the crime could not have been consummated. Held, that there was sufficient evidence to justify a conviction. *State v. Werner*, 83.
 5. Three days after the commission of the alleged crime the prosecutrix made certain statements to her mother concerning the facts of the case, and the mother was called as a witness and permitted to detail the particulars of such statement over the objection of defendant's counsel. Held, that such testimony was competent, in view of the prior attempt on cross-examination of the girl to discredit and impeach her testimony theretofore given to the effect that she had made such statements to her mother, and also in view of the further fact that the defense had brought out on cross-examination a portion of such particulars. *State v. Werner*, 83.
 6. There was a substantial conflict in the evidence as to whether the original government monument marking the south end of the quarter section lines between the lands of plaintiff and defendant was established at the point contended for by plaintiff or at the point contended for by defendant, and hence it was error to direct a verdict. *Propper v. Wohlwend*, 110.
 7. The fact that a verdict is given for a sum larger than demanded in the original complaint cannot be first raised on appeal. *McClain v. Nurnberg*, 144.
 8. The insufficiency of the evidence to sustain the verdict cannot be raised for the first time on appeal, and not then until the particulars are pointed out on new trial proceedings. *McClain v. Nurnberg*, 144.
 9. Whether or not such a contract as the one stated in the complaint was in fact entered into was, under the evidence, a question for the jury, and it was therefore error to direct a verdict in plaintiff's favor. *Anderson v. Johnson*, 174.
 10. When plaintiff rested his case the trial court directed a verdict in defendant's favor. Held, error, as plaintiff's proof showed that he had a valid and subsisting lien upon the property described in the complaint, and that defendant had converted the same. *Schlosser v. Moores*, 185.
 11. Such a case where there is a conflict in the evidence as to the time of day when the accident occurred, and as to whether the day was foggy or clear and as to whether the train regarding which the defendant's witnesses testified was the one which did the damage, and as to the other facts, it being conceded by the defendant's witnesses that they did not stop the train which they were running, and which killed cattle on that day and took no precaution to avoid injury after they discovered the cattle. Held, that the question of negligence on the part of the defendant was properly submitted to the jury and the defendant's motion for a directed verdict was properly overruled. *Carr v. Seo Ry. Co.*, 217.
 12. The corrections of error of law in framing and refusing special verdicts can only be made by appeal or motion for a new trial. *Olson v. Mattison*, 231.

VERDICT—Continued.

13. Both parties made motions for a directed verdict after all the evidence was submitted. The court overruled one motion and granted the other. The parties by such motions waived their right to submit questions of fact to the jury, and submit all such questions to the court for its decision, and neither party can complain on motion for new trial or appeal that the question of warranty was not submitted to the jury. *Larson v. Calder*, 248.
14. Where both parties move for a directed verdict, the action of the trial court will be sustained unless there is an absence of any facts in the evidence on which to base it. *Larson v. Calder*, 248.
15. Error cannot be predicated upon the ruling of the trial court in denying defendant's motion for a directed verdict made at the close of plaintiff's case in chief, where defendant subsequently introduces evidence, and does not remove his motion at the close of all the evidence. Such ruling, if error, was thereby waived by the defendant. *Madson v. Rutten*, 281.
16. In an action in claim and delivery in which the issues were as to the right of possession, damages, and the right to and the amount of the lien claimed on the property in suit, the jury returned a verdict as follows: "We, the jury in said action, do hereby find for the defendant in the sum of \$12.00." Held, that this verdict was not responsive to the issues, and was not in law a verdict. *Johnson v. Glaspey*, 335.
17. Under the provisions of section 8328, Rev. Codes 1905, which is to the effect, that if the jurors are discharged without rendering a verdict "* * * the court shall proceed again to trial as in the first instance, until a verdict is rendered," where the jury returned what was in form a verdict, but which failed to find on all the material issues, the justice was warranted in holding that it was not a lawful verdict, and in setting the case for retrial. *Johnson v. Glaspey*, 335.
18. The word "verdict" is not an abstract designation of the finding of a jury after a case is submitted to it, but relates to the issues raised by the pleadings and evidence, and what may in form be a verdict is not such in law unless it substantially responds to all the issues. *Johnson v. Glaspey*, 335.
19. Where neither the contract sued upon, upon its face, nor plaintiff's evidence disclosed, that such contract was legal, it is error to direct a verdict on such ground. *Frankel v. Hillier*, 387.
20. Appellant was convicted of the crime of shooting at another with a firearm, with intent to do bodily harm. At the conclusion of the state's case, and also at the conclusion of all the testimony, defendant moved that the jury be advised by the court to acquit. Held, that these motions were properly denied, there being sufficient evidence of guilt to require a submission thereof to the jury. *State v. Hunsakor*, 420.
21. It is not error to deny a motion for a directed verdict or for a judgment notwithstanding the verdict, when the evidence shows a conflict as to whether the cause of action pleaded has been proven. *Higgs v. Soo Ry. Co.*, 446.
22. Evidence examined and held, that the verdict is excessive as to certain sums, warranting the granting of a new trial, unless such sums are remitted. *Aronson v. Oppegard*, 595.

VEXATIOUS LITIGATION. SEE ABATEMENT, 138.

VOTERS. SEE ELECTIONS, 363.

WAIVER. SEE MORTGAGE, 42; APPEAL AND ERROR, 138; JURY, 546.

1. The vendee was bound to point out the defects complained of in the vendor's title, and by pointing out specific defects he waived those, if any, not mentioned by him. *Woodward v. McCollum*, 42.
2. An objection to a notice to quit leased premises, on the alleged ground that the notice does not allege the ground on which the possession is claimed is waived by going to trial without specifically attacking the notice on that ground. *McClain v. Nurnberg*, 144.
3. A notice to quit is not waived by the failure to commence an action for possession under 60 days from the time of giving such notice. *McClain v. Nurnberg*, 144.
4. Where the trial court grants leave to amend a complaint and to file the former amended complaint at a later time, and the trial proceeds on the theory that the complaint has been regularly amended, and no objection is made to the irregularity until the case reaches the Supreme Court on appeal, the irregularity is waived. *McClain v. Nurnberg*, 144.
5. Defendant does not waive such want of jurisdiction by pleading guilty to the charge thus insufficiently alleged. *State v. Newton*, 151.
6. Where both parties move for a directed verdict they waive their right to submissions of questions of fact to the jury. *Larson v. Calder*, 248.
7. Where defendant moves for a directed verdict, subsequently introduces evidence and fails to renew his motion at the close of all the evidence, waives error in the ruling of the court against him. *Madson v. Rutten*, 281.
8. Levy of a writ of attachment upon property covered by chattel mortgage does not waive the lien of such mortgage. *Madson v. Rutten*, 281.
9. From the voluminous evidence in the case, it is found that defendant Baird waived his rights as holder of a lien on chattels belonging to the plaintiff in favor of certain third parties, who took security on the same chattels, in consideration of such third parties making advances and extensions necessary to enable the plaintiff to carry out the terms of the contract with defendant Baird for the cropping of lands belonging to him during the season of 1905. *Gordon v. Goldamer*, 323.
10. The defendant Goldamer purchased lands from the defendant Baird before the crop of 1905 was fully secured, and with it the indebtedness of plaintiff to Baird, secured by the lien above referred to. Held, that the evidence establishes the fact that at the time of such purchase the defendant Goldamer had both notice and knowledge of such waiver by Baird, and that the security held by Baird was inferior to that held by the third parties. *Gordon v. Goldamer*, 323.

WAIVER—Continued.

11. The filing of an undertaking in such cases pertains to the jurisdiction of the District Court over the cause and subject matter of the appeal and cannot be waived by consent of the appellee in submitting to the jurisdiction of the District Court. *Deardoff v. Thorsensen*, 355.

WARRANTY.

1. Respondent purchased two horses of appellant, who represented a discharge from their nostrils as being caused by a cold caught in swimming the Missouri, and stated that they were sound, and would be all right in a day or two, in answer to respondent's inquiry as to the cause of the discharge. Held, that if there was doubt as to this representation on being a warranty, it was a proper question for submission to the jury. *Larson v. Calder*, 248.
2. Conviction under section 9077, Rev. Codes 1905, is not a necessary prerequisite to the maintenance of an action for damages for breach of warranty of horses against the disease known as "glanders." *Larson v. Calder*, 248.
3. Both parties made motions for a directed verdict after all the evidence was submitted. The court overruled one motion and granted the other. The parties by such motion waive their right to submit questions of fact to the jury, and submit all such questions to the court for its decision, and neither party can complain on motion for new trial or appeal that the question of warranty was not submitted to the jury. *Larson v. Calder*, 248.
4. Plaintiff may recover damages on the sale of horses warranted against infectious disease, cost of medicine, feed and attendance, between the sale and the date when the state veterinarian killed them because of such infection. *Larson v. Calder*, 248.
5. It is not necessary to allege or prove in an action for breach of warranty against an infectious disease that the vendor had knowledge of the infection at the time of the sale. *Larson v. Calder*, 248.
6. A complaint in an action brought by the assignee of a remote grantee to recover damages for breach of covenants in a deed to real property, which the complaint alleges that the covenantor neither had title to nor possession of at the time of the execution and delivery of such deed, and fails to allege any transfer of such cause of action by the covenantor to plaintiff's assignor, does not state facts sufficient to constitute a cause of action. *Bull v. Bieseker*, 290.
7. If a grantor assumes to convey real property with full covenants of warranty when he has neither title nor possession, there is at once a constructive eviction of the grantee, which entitles him to the same remedies which he would have had if he had been evicted from actual possession. *Bull v. Bieseker*, 290.
8. In order to recover in such an action, plaintiff must allege and prove either privity of estate or of contract. *Bull v. Bieseker*, 290.

WITNESSES.

1. When there is a substantial conflict in the testimony, it is a reversible error to direct a verdict. Such action by the court is a clear invasion of the province of the jury, as the jury, and not the court, must determine the credibility of the witnesses. *Zink v. Lahart*, 56.

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WITNESSES—Continued.

2. Certain admonitions by the trial judge to the defendant, while on the witness stand, but not in the presence or hearing of the jury, were not prejudicial to the rights of the defendant. *Zink v. Lahart*, 56.
3. The competency of a child 8 years old as a witness is for the trial judge to determine within a sound judicial discretion, and such determination will be reversed upon appeal only upon manifest abuse of such discretion. *State v. Werner*, 83.
4. Prosecution was permitted, over objection, to prove by a physician a conversation between defendant, the state's attorney and the witness, to show defendant's admission of being afflicted with a loathsome disease, claimed to be communicated to the girl, the victim of a rape; in such conversation defendant said: "There is Doctor Todd who treated me. He can tell you." This testimony is deemed improper by the defense, first, because it violated section 7304, Rev. Codes 1905, exempting a physician from testifying without the consent of the patient as to any information acquired in attending him; and second, because such conversation could not be construed as an expressed or implied admission of the fact sought to be proved. Such objection held untenable. *State v. Werner*, 83.
5. In an action to foreclose a deed given as security for debt, wherein the grantee, witness and the heirs at law of the grantor, since deceased are adverse parties, testimony of the grantor that he paid interest on a prior mortgage and taxes on the mortgaged premises to protect the lien of his deed, does not come within the statute disqualifying a party to an action from testifying to transactions had with a person since deceased. *Omlie v. O'Toole*, 126.
6. Opinions of witnesses are in general irrelevant. Certain exceptions to this rule, however, exist. Where, for example, the witness is asked to testify from his observation in talking with a person whether in his opinion that person's mind was clear, and whether he was sane or insane. *Nelson v. Thompson*, 295.

WOOD'S LAW. SEE TAXATION, 199.

WORDS AND PHRASES.

1. A mandamus proceeding is not an action under sections 6741, 6742 and 6743, Rev. Codes 1905, being a special proceeding. Under section 7229, Rev. Codes 1905, only actions are triable de novo in the Supreme Court, and this does not contemplate trial de novo of special proceedings. *State v. Fabrick*, 94.
2. The words "all costs" contained in an undertaking on appeal, section 8503 Rev. Codes 1905, are sufficiently comprehensive to cover costs on appeal. *Johnson v. Glaspey*, 335.
3. The word "verdict" is not an abstract designation of the finding of a jury after a case is submitted to it, but relates to the issues raised by the pleadings and evidence, and what may in form be a verdict is not such in law unless it substantially responds to all the issues. *Johnson v. Glaspey*, 335.

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